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REGISTRATION CASES.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND IN THE

COMMON PLEAS DIVISION

OF

THE HIGH COURT OF JUSTICE

ON

APPEAL FROM THE DECISIONS OF THE REVISING BARRISTERS,

From Michaelmas Term, 1872, to Michaelmas Sittings, 1878,
BOTH INCLUSIVE.

BY

C. H. HOPWOOD, Q.C., AND F. J. COLTMAN, ESQRS.
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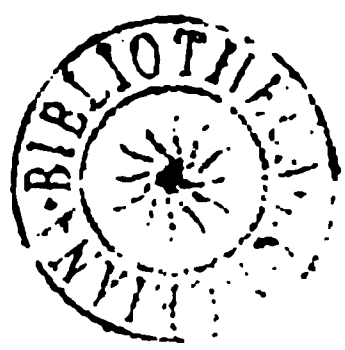

JUDGES

OF

The Court of Common Pleas,

AND OF

The Common Pleas Division

OF

The High Court of Justice

DURING THE PERIOD COMPRISED IN THESE REPORTS.

The Right Hon. Sir WILLIAM BOVILL, Knt., L.C.J.

The Right Hon. Lord COLERIDGE, L.C.J.

The Hon. Sir JOHN BARNARD BYLES, Knt.

The Hon. Sir HENRY SINGER KEATING, Knt.

The Hon. Sir WILLIAM BALIOL BRETT, Knt.

The Hon. Sir WILLIAM ROBERT GROVE, Knt.

The Hon. GEORGE DENMAN.

The Hon. Sir GEORGE ESSEX HONYMAN, Bart.

The Hon. Sir THOMAS DICKSON ARCHIBALD, Knt.

The Hon. Sir JOHN WALTER HUDDLESTON, Knt.

The Hon. Sir NATHANIEL LINDLEY, Knt.

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ERRATA.

Page 29, line 6 from top, for "16 Vict. c. 18," *read* "6 Vict. c. 18."
Page 33, line 5 from top, for "31 & 32 Vict. c. 38," *read* "31 & 32 Vict. c. 58."
Page 152, line 9 from bottom, for "accupation," *read* "occupation."
Page 211, line 14 from top, for "1873," *read* "1872."
Page 228, line 12 from bottom, for "1873," *read* "1872."
Page 280, head line, for "HILARY" *read* "MICHAELMAS."
Page 337, line 10 from top, for "30th section," *read* "36th section."
Page 390, line 10 from bottom, for "50*l*.," *read* "12*l*."

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

UNDER THE STT. 6 VICT. c. 18,

IN

MICHAELMAS TERM, 1872,

AND

HILARY AND EASTER TERMS, 1873,

IN THE

THIRTY-SIXTH YEAR OF QUEEN VICTORIA.

SIMEY, Appellant; MARSHALL, Respondent.

1872.

Nov. 15.

The corporation of a hospital consisted of the master and three ancient brethren, in whom lands were vested by the charter of incorporation. The bishop was empowered to make statutes, among other purposes, for the addition of younger brethren, who, however, were to form no part of the corporation. The number of younger brethren under the existing statutes was twenty-three, their appointments being made by the master. They were liable to dismissal for misconduct, but no instance of dismissal was known. The estates were under the management of the master, who, after paying the land and income tax, tithes, repairs, and other outgoings, was to retain one-third of the net revenues for himself, pay £25 to each of the ancient brethren, and £70 to the chaplain, and, after reserving a balance not exceeding £60 for current expenses, to divide the residue among the younger brethren, so that no younger brother should receive more than £25. The share of a younger brother had always, in fact, exceeded £24. No hospital building was in existence, nor did any younger brother occupy any land of the hospital. *Held*, that the younger brethren had neither equitable estates in the land, nor "tenements" in the nature of rent-charges.

THE case stated—

At a Court for the revision of the Lists of Voters in the election of Knights of the Shire, held at *Gateshead*, in and for the Northern Division of the county of *Durham*, on the 24th day of *September*, 1872, and by adjournment at the city of *Durham*, on the 19th day

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of *October*, 1872, before one of the barristers appointed to revise the List of Voters, *James Shafto* duly objected to the following claim to be entitled to vote in respect of property situate within the parish of *Gateshead*.

Bennet, James,	*Powel's Court, Gateshead.*	Freehold land, freehold coal mines, freehold rent-charges or ground rent.	*Friar's Goose* farm, chemical works and adjacent land, *Claxton's* farm, *Cemetery Road*, *Claxton's* quarry and adjacent land under *Friar's Goose* estate issuing out of freehold land, *King James Street, Gateshead.*

The following facts were established by the evidence:—

1. The hospital of King James in *Gateshead* has existed from time immemorial. Its founder is unknown and the foundation charter has long been lost.

2. By a re-foundation charter, dated 4th *January*, 1610, King James the First incorporated the hospital, which then consisted of one master and three brethren, by the title of "The Hospital of King James at *Gateshead*." The charter provides that the Rector of *Gateshead* should for ever be the Master of the Hospital, that there should be three poor and needy men, bachelors or widowers advanced in life, sustained, maintained, and relieved in the hospital, who should be called the Brethren, and should remain, be sustained and relieved during their natural lives. The charter further provides that when and so often as it should happen that any of the brethren should die or be removed from the hospital for any cause prescribed by

the ordinances and provisions and constitutions of the hospital, or in any other manner whatsoever should be removed from the hospital, or should withdraw of his own accord, that then the master should within fourteen days nominate and place in actual possession any other fit person. The charter further provides that the Bishop of *Durham* and his successors should from time to time revise the ancient statutes, laws, ordinances, and constitutions of the hospital, and make such good, fit, and wholesome statutes in writing concerning the government and direction of the master and brethren as should not be contrary or repugnant to law. And by the charter, the hospital with the garden and other lands (the greater part of which still belong to the hospital) were granted to the master and brethren and their successors, to have, hold, and enjoy the same to the sole and proper benefit and use of the master and brethren and their successors, in free, pure, and perpetual frankalmoign for ever. It was also provided that after the death of the then master, his successors should have and enjoy for their own use and benefit one full third part of the rents, revenues, and profits of all and singular the lands, tenements, and hereditaments thereby granted to the hospital, and the brethren and their successors should have and enjoy for their own use and maintenance the other two parts of such rents, revenues, and profits.

3. An Act of Parliament was passed in 1811 (51 *Geo.* 3, c. cxvi.) for enabling the master and brethren of the hospital to grant leases, and to enable the Bishop of *Durham* to make statutes and ordinances for the government of the hospital. This Act recited the

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re-foundation charter, and that the master and brethren were seised of certain lands in *Gateshead*, which are specified in the schedule thereto, and that the Bishop of *Durham* was the patron of the mastership of the hospital as annexed to the Rectory of *Gateshead*, and that the master of the hospital had the appointment of the brethren in case of vacancy. It also recited that no statutes or ordinances of any kind were then known, and that in respect thereof the estate of the said hospital was capable of considerable improvement; that it was also expedient that statutes should be made for the government of the hospital, and that the benefits of the hospital should be extended to a greater number of poor aged men in furtherance of the benevolent intentions of the founder thereof. The Act then, after giving a power of leasing to the master and brethren, proceeded to enact that the Bishop of *Durham* might from time to time, by writing under his hand, make and establish such good, convenient, and wholesome statutes, laws, ordinances, and constitutions, as well concerning the Divine service to be performed in the hospital, and the allowance to be made for the same, as touching the government and direction of the master and brethren, and providing for the repairs of the estate of the hospital, as also for increasing the number of the poor and aged brethren, and such statutes, laws, ordinances, and constitutions, from time to time to revise, alter, and amend, so as the same be not contrary either to the laws of the realm or to the charter, except as to the increase of the number of the brethren. And it further enacts, that all such brethren as should be from time to time added as aforesaid, should be named, appointed, and admitted,

and from time to time for ever be filled up in the same manner as is prescribed by the charter for naming, appointing, and admitting the three ancient brethren, and all such additional brethren should be called "The Younger Brethren," and should not be deemed or taken to constitute any part of the said body corporate, provided that nothing in the Act should authorize the making of any statute which should reduce or lessen the income of the then present master and three brethren from the rents and profits of the estates belonging to the hospital, but that they should during their lives receive for their shares of the future rents and profits of the estates as much as they then actually received from such rents and profits, and that the shares of the younger brethren should always be less than the shares of the master and the three ancient brethren.

4. The schedule to this Act includes the whole of the lands which still belong to the hospital, and in respect of which the younger brethren claim to vote.

5. On the 17th *October*, 1811, *Shute Barrington*, Bishop of *Durham*, made certain statutes and ordinances, under the power contained in the Act of Parliament, by which it is ordered (amongst other things) that, in addition to the three ancient brethren, who, together with the master, then constituted the corporate body, there should be ten younger brethren who should be entitled to the advantages after mentioned, that no persons should be capable of being appointed younger brethren except single men of the age of fifty-six and upwards, not possessing more means than £20 per annum, of unexceptionable life and conversation, regular attenders of the Church of *England*, and fre-

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quenters of the holy sacrament; that the brethren should attend divine service regularly when opportunity offers, and should be sober, discreet, and regular in life and conversation; that, in case of one or more of the brethren being guilty of drunkenness, or any other immorality, the master should certify the same to the Bishop, who should proceed either by himself, or by the Archdeacon of *Durham*, or by other clergymen of the diocese, to examine into the circumstances of the case, and should either remove him from the hospital, or subject him to such lesser punishment as he should think fit: that the brethren should, from time to time, be appointed by the master: that such younger brethren as should reside within a convenient distance of the chapel, should have proper seats prepared and set apart for their accommodation, and should regularly attend divine service, except when prevented by illness, or other lawful impediment, admitted by the master: that for performance of divine service and preaching in the chapel, a chaplain should be appointed by the master, with the approbation of the bishop: that the estates of the hospital should be under the direction and management of the master, who should receive and take account of the revenues thereof, and should, in the first place, pay thereout the land-tax, income-tax, tithes, repairs, and all other outgoings affecting the same, and after that was done the master should carry one-third part of the net rents and revenues of the hospital estates to his own account, and should then pay £25 to each of the three ancient brethren, and £40 to the chaplain for his salary; and after making those payments, the master should, on 24th *December* in every year, divide the

residue of the said net rents and revenues between the younger brethren of the hospital, in equal shares and proportions, yet so, nevertheless, that no younger brother should take under such division more than £25, the sum directed to be paid to each of the ancient brethren.

6. On the 9th *October*, 1849, *Edward Maltby*, Lord Bishop of *Durham*, made further statutes, under the Act of Parliament, by which it was ordained, amongst other things, that to the ten younger brethren ordered to be appointed by the statutes of 1811, should be added two more as soon as the funds should admit, that the master should have power from time to time to advance to the younger brethren such sums as the state of the revenues might appear to him to allow, and that he should, on or before the 25th *March*, in each year, distribute the surplus among them, reserving a balance in his hands not exceeding £60, to meet the current expenses, provided that the shares of the younger brethren should always be less than the shares of the master and the three ancient brethren.

7. By a statute made 8th *October*, 1867, by *Charles Baring*, Bishop of *Durham*, four more younger brethren were added to the twelve theretofore existing. And by another statute of the same bishop, made 2nd *April*, 1869, other six younger brethren were added. A subsequent statute of the same bishop has since added one other younger brother, the total number at the present time being these twenty-three.

8. The said claimant, *James Bennet*, and twenty-two other persons, have been duly appointed, and now are the younger brethren of the said hospital. There is no written form of appointment of a younger bro-

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ther, such appointment being made by the master entering his name and the date of his appointment in the roll kept by him.

9. No instance of dismissal of a brother has ever been known.

10. The number of younger brethren has never been increased so as to reduce their respective shares below £24 per annum, and, in fact, the share of each younger brother of net rents and revenues of the hospital estates has, ever since the Act of 1811, amounted to upwards of £24 per annum, which sum, as well as the chaplain's stipend of £70 per annum, has been regularly paid to them by the master.

11. There is no hospital building at present in existence, and neither chaplain nor any of the brethren actually occupy any part of the property belonging to the hospital.

12. Upon these facts it was contended for the objection that the amount of the annual payments to the claimant would never exceed £25, and might be less if the bishop should think fit to increase the number of younger brethren, that the claimant, together with the other younger brethren, was not entitled to the surplus of the lands and tenements in question, or of the rents and profits thereof, after providing for the one-third share of the master, the payments to the ancient brethren and the chaplain's salary, but that after deducting the master's share and paying the £25 a-piece to the three ancient brethren, the chaplain's salary, and the claimant and the other younger brethren the £25, or such lesser sum as for the time being they should be entitled to, the surplus of the rents and profits must be set aside for any additional younger brethren that

might be appointed, and that consequently the claimant could not be considered a part owner of the said lands and tenements or as having an estate at Law or in Equity therein. It was also contended that the sum payable to the claimant was not a rent-charge, both because it was of uncertain amount and liable to be varied, and because such sum was not a charge upon the said lands and tenements.

13. On the other hand, it was contended for the claimant that inasmuch as the whole surplus of the rents and profits of the lands and tenements, after deducting the master's third part and the payments to the ancient brethren and the chaplain's salary, must be divided among a certain class, viz., the younger brethren, of which class the claimant was one, the circumstance of the number of such class being liable to be increased, and possibly the payment to each person of that class being liable to be diminished, did not prevent the whole class, although varying from time to time, from being equitable owners of and having an equitable estate in the said lands and tenements; that as the present amount of the payments to each younger brother was above £5 a year, he was entitled as having an equitable estate for life in the lands and tenements to be registered as a voter. Also that, if not having such equitable estate in the said lands and tenements, the claimant had a rent-charge or such an interest in the nature of a rent-charge in the said lands and tenements as to enable him to be registered as a voter.

14. The Revising Barrister was of opinion that inasmuch as the claimant and the other younger brethren were not necessarily entitled to the whole surplus after paying the ancient brethren and the chaplain the sums

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aforesaid of the net two-thirds of the rents and revenues of the hospital estates, but were only each entitled to receive thereout an annual payment never exceeding £25 per annum, they had not an equitable estate in the said lands and tenements. He also was of opinion that the amount of the payments to the claimant not being a fixed or certain charge upon the said lands and premises was not a rent-charge. He therefore disallowed the claim, and struck the claimant's name out of the list of claimants.

If the Court were of opinion that the claimant was entitled to be registered as a voter, either as the owner of an equitable estate in the said lands and tenements or as being entitled to a rent-charge of the requisite amounts issuing out of the same, then the claimant's name was to be restored.

The appeals of the twenty-two other younger brethren were consolidated with that of the appellant.

Hugh Shield for the appellant. The appellant is one of the younger brethren of the hospital, and as such has an equitable estate for life in land, of not less than £5 yearly value. If so, under 30 & 31 *Vict.* c. 102, sec. 5, sub-sec. 1, he is entitled to the franchise. No hospital building is now in existence, and consequently the question which frequently arises in such cases as to the occupation of specific rooms, and as to the right of the governing body to shift the occupant from his rooms does not arise. Although a power of amotion on certain grounds exists, there is no instance of its ever being exercised, nor does it reside in the same authority as the power of appointment. If the claimant has, as is submitted, an estate

in the land, the authorities show that the question whether the original motives for the foundation of the hospital were of an eleemosynary character, or not, is not material. If it be asked what fraction of interest each of the twenty-three younger brethren has, the answer is that he has one twenty-third share of the surplus rents and profits, after providing for the payments prescribed by the statutes. Of course if that share fell below £5 in annual value, as it might do if the number of the younger brethren were largely increased, the appellant would cease to have a right to vote; but he has the right to vote, so long as his share continues above that amount. No doubt it is difficult to define the exact interest which each younger brother takes in the land, as contradistinguished from his interest in the surplus rents and profits. The case, however, is not concluded by authority. *Steele* v. *Bosworth* (*a*), though similar in its facts is distinguishable. In that case the surplus was not as here disposed of in favour of the class of persons who sought the franchise, but it remained undisposed of. Here, on the contrary, the younger brethren are indisputably entitled to a division of the net surplus among them, if the share of each does not exceed £25. If, on the other hand, the surplus be more than sufficient to pay the younger brethren £25 each, then the excess is accumulated until the funds are sufficient to increase the number of younger brethren. But substantially the surplus goes to the class of younger brethren. As regards the legal estate in the land it is, of course, admitted that that is in the corporation.

(*a*) *Hopw. & Ph.* 106; *S. C.* 18 *C. B., N. S.* 22.

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[BOVILL, C.J. Do you say the Corporation are trustees for the younger brethren of the lands, or of the surplus funds?]

They are trustees of the lands. They would be trustees for the ancient as well as the younger brethren, and the ancient brethren would have equitable estates in the lands, but for the rule which prevents members of a corporation from having equitable estates where their enjoyment is as corporators, and in fulfilment of the purposes of the incorporation. Here the equitable estate in the lands is in the younger brethren, though they hold them subject to a charge in favour of the ancient brethren.

Secondly, the claimant if he has not an equitable estate in the land has a "tenement" within 8 *Hen.* 6, c. 7. In *Rex* v. *Tolpuddle* (*a*), the depasturing of cows for a limited part of the year, under an agreement, was held to be a "tenement" within 13 & 14 *Car.* 2, c. 12. And *Kenyon*, J. said, "Anything is a tenement which is a profit out of land," a definition which embraces the present case. The "tenement" for which the vote is claimed here is not incapable of being a rent merely because it is liable to fluctuations. *Reg.* v. *Westbrook* (*b*). In *Robinson* v. *Ainge* (*c*), which was the case of a friendly society, the respondent, a member, was entitled to an annuity of 4*s.* per week, *if the funds would admit*, "arising and to be paid out of the *property* of the society." *Bovill*, C.J., said "If the word 'property' were there used to denote real property, I think that this claim might be sustained."

(*a*) 4 *T. R.* 671.
(*b*) 10 *Q. B.* 178.
(*c*) 1 *Hop. & Colt.* 193; *S. C. L. R.* 4 *C. P.* 429.

There, as here, the payment of an annuity sufficient in point of value to confer the franchise, depended on the funds continuing to be sufficient; but *Bovill*, C.J., seems to have thought that that would not have constituted a valid objection to the franchise, if "property" had meant real property, which the Court held it did not. *Ashmore* v. *Lees* (*a*) is not an adverse authority. There the amount of the money payment which each inmate of the hospital was entitled to receive was not sufficient to confer the franchise, otherwise the franchise would have been upheld.

He referred also to *Roberts* v. *Percival*(*b*).

Manisty, Q.C. (*C. Crompton* with him), for the respondent, was not called upon.

BOVILL, C.J. There is no doubt that by the constitution of this hospital, the legal estate is vested in the corporation, consisting of the master and the three ancient brethren. The estates of the hospital are under the direction and management of the master, who is to receive and take account of the revenues, and pay the various outgoings, and after that is done to carry one-third of the net rents and revenues to his own account, pay £25 to each of the three ancient brethren, and £70 to the chaplain; and then in every year divide the residue between the younger brethren, so, nevertheless, that no younger brother shall take more than £25.

Looking at the terms of this constitution, I think that all the younger brethren are entitled to is an

(*a*) 1 *Lutw.* 337; *S. C.* 2 *C.B.*, 31.

(*b*) *Hopw. & Ph*, 121; *S. C.* 18 *C. B., N. S.* 36.

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equitable right to a share of money which, after the above payments have been made, may form the surplus of the trust funds; and that the case is even stronger than that of *Steele* v. *Bosworth* (*a*). The younger brethren are not, in my judgment, entitled to any equitable estate or interest either in the land, or in any rent issuing thereout. Consequently, the decision of the Revising Barrister was right, and must be affirmed.

KEATING, J. I am of the same opinion. Many cases have arisen before us in which the franchise has been claimed by inmates of hospitals, and in which the question has been whether the claimant could make out that he had an interest, either legal or equitable, in any portion of the estates. Here there is a total absence of anything approaching to show that the claimant had a right to any defined portion of the estates, or of the proceeds thereof. The master receives the revenues of the hospital, and after making certain payments, which vary from year to year, he is to divide the surplus, if any, among the younger brethren, but so that the share of each is not to exceed a certain limit. Without overruling *Steele* v. *Bosworth* we could not hold that this confers the franchise. It is said that the surplus was there undisposed of; but so too is it here, if there be more than enough to pay to each of the younger brethren £25. The ground of that decision was, that the voter was not entitled to any equitable interest in the land, but merely to a money payment; and that ground applies here. That case therefore governs the present.

(*a*) *Hopw. & Ph.* 106; *S. C.* 18 *C. B., N. S.* 22.

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Mr. *Shield* further argued, that the claimant was entitled to a rent-charge; but I do not think he relied much on that ground The sum to which the claimant is entitled is fluctuating and indefinite, and it is impossible to fix an amount for which he could distrain. I think the decision of the Revising Barrister was correct. The claimant was entitled, as in *Steele* v. *Bosworth*, to a money payment and nothing more.

BRETT, J. In this case it is not suggested that the claimant has any legal interest in land; but it is contended that, as a younger brother, he has an equitable interest. He must show that he has an equitable interest either in the whole lands or in some specific part of them. Now the younger brethren have clearly not the entire equitable interest in the whole lands, Have they then equitable interests in the whole lands as tenants in common, or joint tenants, with the ancient brethren? That cannot be; since, as regards the ancient brethren, it stands admitted that they do not take equitable interests in the lands. Then, have the younger brethren equitable interests in any specific part of the lands? No specific part could be pointed out. Mr. *Shield* was compelled to contend that the younger brethren have equitable interests in the whole lands; and that the ancient brethren have a charge upon that interest. But that contention is not maintainable. The claimant has no specific interest either in the whole lands, or in any part of them; nor is he entitled to any specific money payment issuing out of the whole lands, or out of any portion of them. It is only after the master has paid the outgoings, retained his own third, paid the ancient brethren and

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chaplain, and set aside a balance for current expenses that the claimant is to be entitled to a share with the other younger brethren. That share is therefore contingent on a surplus; and, further, it is limited to £25, so that if there be a surplus beyond what is sufficient to pay the claimant £25, he does not participate in it. The case of *Steele* v. *Bosworth* is therefore directly in point, and is an authority against the franchise.

Mr. *Shield* then urged that the claimant had a freehold "tenement" within 8 *Hen.* 6, c. 7; but, on being asked to define the nature of the tenement, he said that it was a rent-charge. I am clearly of opinion that it is not a rent-charge. The amount of the payment is fluctuating, and it could not be distrained for. I think the decision of the Revising Barrister was correct, and should be affirmed.

GROVE, J. I am of the same opinion.

Decision Affirmed.

Attorneys.—For Appellant, *J. W. Hickin*, for *Ralph Simey, Sunderland.*

For Respondent, *Rogerson & Ford*, for *Marshall & Son, Durham.*

BROWN, Appellant; TAMPLIN, Respondent.

Nov. 20.

A consolidated appeal was signed on the 31st *October*, and, no one else assenting to be named respondent, the Returning Officer was named by the Revising Barrister. Notice of appeal was not given to the respondent till the 4th *Nov.* (the first day appointed for hearing appeals being the 13th), and it was sought to excuse the delay. The respondent not appearing, *held* that there had been *reasonable time* to give ten days' notice before the 13th, and consequently that the appeal could not be entertained.

WHEN this appeal from the decision of the Revising Barrister for the borough of Marylebone was called on in its turn, on the 13th of *November* (the first day appointed by the Court for the hearing of Registration Appeals), the respondent did not appear, notice of the appellant's intention to prosecute the appeal not having been given to him until the 4th of *November*.

Tindal Atkinson thereupon moved that the hearing of the appeal be postponed, relying on an affidavit of the appellant's attorney disclosing the following facts:—

"That this case was not settled by the Revising Barrister, nor was the respondent appointed (it being a consolidated appeal) until the 31st day of *October* last.

"That the above-named *George Tamplin* objected to be appointed respondent, and after the case was settled there was some discussion with the Revising Barrister as to the right of the latter to appoint the said *George Tamplin* respondent against his will. The Revising Barrister also required, after he had settled the said case, to compare the schedule with his lists."

Under the circumstances, I promised I would not deposit the said case until Monday the 4th of *November*, before which day the Revising Barrister had satisfied himself that the schedule was correct, and no one

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agreeing to become respondent, no alteration was made in the appointment of the said *George Tamplin* as such respondent, but I did not know for certain, until the 4th day of *November*, whether some other person might not have agreed to become respondent, in which case such last-mentioned person would have been appointed respondent to this appeal.

The respondent, *George Tamplin*, was the returning officer (*a*) for the borough.

The Court allowed the appeal to stand over for argument, without prejudice to the question whether they would ultimately allow it to be heard.

Sir *J. Karslake* (*T. Atkinson* with him), now (*November* 20th) contended that the appeal might be heard, relying on the proviso in sec. 64 of 6 *Vict.* c. 18, that "If it shall appear to the said Court that there has not been reasonable time to give or send such notice in any case, it shall be lawful for the said Court to postpone the hearing of the appeal in such case, as to the said Court shall seem meet." The appeal was a consolidated one, and the case not stated till the 31st of *October*, so that until that date notice to the respondent could not be given. The subsequent delay in giving notice, viz., from the 31st of *October* to the 4th of *November*, was explained by the circumstances detailed in the affidavits. It was true that there was a respondent on the 31st of *October*, to whom notice might have been given, but the conduct of *Tamplin* had misled the appellant into the belief that some one else would be appointed respondent.

(*a*) See 6 *Vict.* c. 18, s. 101, as to when the word "town-clerk" extends to the Returning officer.

[KEATING, J. (after expressing a doubt whether the Revising Barrister, having appointed *Tamplin* respondent on the 31st of *October*, could afterwards have substituted another respondent, even by consent), said: "Here the difficulty I feel is, that you were placed in no jeopardy; your position not being prejudiced by what took place. On the 31st of *October* a respondent was appointed by the Revising Barrister, and it was in your power to have given him the notice."]

The following cases were referred to during the argument:—*Newton* v. *Overseers of Mobberley* (*a*), *Aldworth* v. *Dore* (*b*), *Luckett* v. *Voller* (*c*).

BOVILL, C. J. If it were open to us to allow this appeal to be heard I for one should have been glad. But the jurisdiction which we exercise in these appeals is minutely defined by Act of Parliament. Moreover the question is not now raised for the first time, but there are a series of decisions to show that we are strictly bound by the statute, and have no discretion to exercise. In *Aldworth* v. *Dore* (*b*) *Wilde*, C. J., said: "I have a strong opinion upon the necessity of adhering strictly to the provisions of this Act of Parliament, and we ought not to hold that the proviso in the 64th section applies, except upon substantial grounds." And in *Palmer* v. *Allen* (*d*) the same learned Judge said: "The jurisdiction created by this Act of Parliament has been long enough in existence to enable all parties interested to become acquainted with the practice. Ignorance is no excuse."

(*a*) 1 *Lutw.* 335; *S. C.*, 2 *C. B.* 203.

(*b*) 2 *Lutw.* 67, 71; *S. C.*, 5 *C. B.* 87.

(*c*) *K. & G.* 371; *S. C.*, 11 *C. B. N. S.* 1.

(*d*) 5 *C. B.* 5; *S. C.*, 2 *Lutw.* 3.

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The question arises on the proviso in sect. 64 of the 6 *Vict.* c. 18 as interpreted by the decisions. The proviso runs thus: "If it shall appear to the said Court that there has not been *reasonable time* to give or send such notice in any case, it shall be lawful for the said Court to postpone the hearing of the appeal in such case, as to the said Court shall seem meet." The Court is always anxious in fixing these appeals to allow due time for compliance with the requirements of the Act; but within my own experience it has been necessary when there have been many appeals to be heard, as was the case after "The Representation of the People Act, 1867," came into operation, that a very early day in the Term should be fixed for hearing these appeals. In the present case the day fixed was the 13th of *November*. And the question is whether there was reasonable time for the appellant to give ten days' notice in accordance with the Act of Parliament before that day. Of course, no notice can be given until there is a respondent; but, in the present case, notwithstanding the large number of persons whose votes were affected, no one was willing to be respondent. There was ample opportunity of determining who should be respondent, if there had been any one willing to assume the responsibility, since the decision of the Revising Barrister was known some time before the case was settled. No one however, came forward for that purpose, and accordingly it became the duty of the Revising Barrister to name a respondent under the provisions of the Act. The Revising Barrister named *Mr. Tamplin*, the returning officer, and the case was signed on the 31st of *October*. That having been done, and the case delivered to the appellant, the appellant

had to act upon it by transmitting it to the Master, and giving the required notices. There was then beyond doubt a respondent, viz., *Mr. Tamplin*, duly appointed; and no other person was respondent, nor was there any difficulty in complying with the requirements of the Act. The appellant had therefore ample time to give the notice, and has failed to do so; and it is not because he may have overlooked or mistaken the provisions of the Act of Parliament that we can hold that he has not had reasonable time. If we had discretion I should be glad to exercise it, but the only question is whether the appellant had reasonable time to give his notice, and I think he had.

KEATING, J. I have come to the same conclusion, though not without reluctance. The simple question is, was there reasonable time to give the notice? I think there was, and that we have no discretion.

BRETT, J. The 13th of *November* was the day appointed for hearing appeals, and ten days' notice was not given, as prescribed, before that day. The case therefore falls directly within the prohibitive words of the 64th section, and the question is whether it falls also within the proviso. Although I do not feel so clear on this point as my Lord, I think that it has not been made to "appear to the Court" as the proviso requires, "that there has not been reasonable time" to give the notice. On the 31st of *October*, *Tamplin* was named respondent, and the appellant knew it, and I cannot say it is clear he had not reasonable time.

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DENMAN, J. I am of the same opinion. I think we are bound by decided cases.

Appeal struck out.

Attorney for appellant—*Beddall.*

COOKE, Appellant; BUTLER, Respondent.

Nov. 13.

The Rate-book is not conclusive of the "rateable value" under 30 & 31 *Vict.* c. 102, sec. 6, sub-sec. 2.

THE case stated:—

At a Court held on the 28th day of *September*, 1872, at *Luton*, in the county of *Bedford*, before the Revising Barrister appointed to revise the lists of voters for the county of *Bedford*, *John Hubbard*, of No. 101, *Wellington Street*, in *Luton* aforesaid, whose name had not been placed by the overseers on the list of persons entitled to vote as owner or tenant of lands and tenements within the said parish of *Luton*, of the rateable value of £12 or upwards, claimed to have his name inserted in the said list as being the occupier of premises of the rateable value of £12 or upwards.

It was proved or admitted that the said *John Hubbard*, being of full age, and not subject to any legal incapacity, had occupied for a sufficient time on the 31st day of *July* last the said premises, and that he paid an annual rent of £14, which it was proved was a fair rent for the same premises, that he was the occupier thereof on the 31st day of *July* last, and had been such occupier for twelve months immediately preceding, that he had been duly rated, and had paid

all poor rates in respect of the premises, and that the premises were in an improving neighbourhood.

It was also admitted that the premises of the said *John Hubbard* were not rated at a lower rate than similar premises occupied by other persons in the said parish.

It appeared from the poor-rate book that the gross estimated rental of the premises was there stated to be £14 9*s.*, and the rateable value £11 12*s.* 6*d.*

It was objected by the said appellant, that inasmuch as the premises were stated in the poor-rate book to be of the rateable value of £11 12*s.* 6*d.* only, and the respondent had paid rates upon that assessment, the respondent was not entitled to be registered as a voter in respect thereof.

The Revising Barrister held that the property was of the real rateable value of £12, and allowed the claim, and inserted the name on the said list.

If the Court should be of opinion that the claim should not have been allowed the name was to be struck out of the said list.

Another appeal, involving the same point, was consolidated with the above.

J. E. Gorst, for the appellant. It is admitted that the appellant is entitled in all other respects to be registered if the rate-book is not conclusive against him. The rateable value as it appears in the rate-book is under £12, and it is submitted on behalf of the appellant that the Revising Barrister is not at liberty to go beyond the rate-book. The question is raised to settle the doubts which have existed on the subject. It depends on the construction to be put on

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sect. 6 of the 30 & 31 *Vict.* c. 102, sub-sect. 2, which requires that the voter should, during the required period, have occupied lands or tenements "of the *rateable* value of £12." The practice under sect. 27 of the Reform Act can afford no guide, since there the words are "clear yearly value," whereas here they are *rateable* value. In *Davis on Registration*, p. 231, it is said, "there may be some question, however, whether rateable value means rateable value on the rate-book, or the *true* rateable value, to be ascertained, if disputed by the Barrister, like the value of a £10 occupation. It certainly would have been better to have said the rateable value as appearing on the rate, and that will probably be the interpretation put upon the words."

Bulwer, Q.C., for the respondent, was not called on.

BOVILL, C.J. I am of opinion that the decision of the Revising Barrister was correct. The question turns on the meaning to be attributed to the words "rateable value" in 30 & 31 *Vict.* c. 102, s. 6, sub-sect. 2. There is a manifest distinction between the words "rateable value of £12" and "rated at the value of £12;" and notwithstanding the expression of opinion in *Davis on Registration*, I think the Revising Barrister has given to the words their true interpretation. If, as has been suggested, it has been the practice of some Revising Barristers to treat the rate-book as conclusive, I think they have acted under a mistaken view of the law. The appeal must be dismissed with costs.

BRETT, J. The question is as to the meaning of

the words "rateable value" in sect. 6, sub-sect. 2. Do they mean the *real* rateable value, to be found as a fact, or do they merely mean that value which is stated in the rate-book, which we must assume for the purpose *not* to be the real rateable value. If the latter view be correct, it follows that the words "rateable" mean "rated at," notwithstanding that we find the word "rated" in the next sub-section. I think it would be contrary to every canon of interpretation so to hold. It is suggested in *Davis on Registration*, that it would have been better if the statute had said "the rateable value as appearing on the rate." That appears to me a question of politics, and not of law; but I entirely dissent from the view expressed, as it would make the right to the franchise depend on the view taken by the overseers, in whom a power of enfranchising and disfranchising would thus be vested.

GROVE and DENMAN, J.J., concurred.

Decision affirmed.

Attorneys—For Appellant.—*Saunders*, for *Whyley Piper, Bedford.*

For Respondent.—*Williams & James*, for *Wilkinson, Butler, & Wilkinson, St. Neots.*

LITTLE, Appellant; The OVERSEERS of the PARISH of PENRITH, Respondents.

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Nov. 15.

THE case stated:—

At the Court held before the Revising Barrister appointed to revise the list of voters for the eastern division of the county of *Cumberland*, for the revision of the list of voters for the parish of *Penrith*, objection was duly made to the name of *George Arnison* being retained upon the list of voters for the said parish. The facts of the case were as follows:—

The name of *George Arnison* appeared upon the list in the following form:—

Parish of *Penrith*.

Voters as Occupiers of Rateable Value of £12.

Christian Name and Surname of each Voter at full length.	Place of Abode.	Nature of Qualification.	Street, lane, or other like place in this parish (or township) and number of house (if any) where the property is situate.
Arnison, George.	*Burrowgate, Penrith.*	Joint Occupier of house and shop of the rateable value of £80 and upwards.	*Devonshire Street.*

The £12 county occupation franchise was claimed by *G. A.* (son of *N. A.*) for partnership premises occupied jointly with *T. B. A.*, a brother and co-partner. The "name of occupier" on the rate-book was "*N. A. and Sons.*" Formerly *N. A.* had been rated solely for the premises, occupying and carrying on the business by himself; but, on taking *G. A.* and *T. B. A.* into partnership, he had requested the overseers to alter the rating to "*N. A. and Sons*," which was done. Afterwards *N. A.* retired, and for some years either *G. A.* or *T. B. A.* had paid the rates when called for, taking a receipt in the name of "*N. A. and Sons.*" *Held*:—That *G. A.* was rated within 30 & 31 Vict. c. 102, s. 6, sub-sect. 3, any insufficiency or inaccuracy in the description being cured by 6 Vict. c. 18, s. 75.

The said *George Arnison* had a right to have his name retained upon the said list, provided the Court should be of opinion that, under the following circumstances, the said *George Arnison* was duly rated in respect of the premises occupied by him, within the meaning of 30 & 31 *Vict.* c. 102, s. 6, sub-sect. 3.

The premises in question are described in the rate-book as follows:—

Name of Occupier.	Name of Owner.	Description of property rated.	Name or situatio of property.	Gross estimated rental.	Rateable value.
N. Arnison and Sons.	*Nathan Arnison.*	House and shop.	*Burrow-gate.*	£105.	£89 5*s.*

N. Arnison means *Nathan Arnison.* He is alive, and was formerly the sole occupier of the premises where he carried on the business of a draper. He subsequently took two of his sons, the above-mentioned *George Arnison* and *Thomas Bell Arnison*, into partnership, and the business was carried on under the name of "*N. Arnison & Sons.*" *Nathan Arnison* has retired from the business some years ago; and ever since his retirement the business has been carried on by the above-mentioned two sons under the name of *N. Arnison & Sons.*"

The said two sons are now the sole occupiers.

Nathan Arnison has three other sons, but they do not occupy the premises in question, nor do they carry on business with the two above-mentioned.

For the last few years, when the rates have been called for, they have been paid by one or other of the two (*George Arnison* or *Thomas Bell Arnison*), and a

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receipt given for them as received from "*N. Arnison & Sons.*"

With the consent of both parties the Revising Barrister received the statement of the overseer, and it is as follows:—The overseer stated that when he came into office, fifteen years ago, "*N. Arnison*" was solely rated for the premises in question. About seven years ago, *N. Arnison* requested him to alter the rating to "*N. Arnison & Sons*," but gave no names, and the rating has remained "*N. Arnison & Sons*" ever since.

The Revising Barrister decided that as the said *George Arnison* was not named in the rate otherwise than as above appears, he was not duly rated in respect of the premises occupied by him within the meaning of 30 & 31 *Vict.* c. 102, s. 6, sub-sect. 3.

The name of one other person (whose name and qualification was set out in the schedule) was objected to under similar circumstances.

The Revising Barrister expunged the names of the said *George Arnison* and of the said other person from the said list.

If the Court should be of opinion that the Revising Barrister was wrong, the name of the said *George Arnison*, and of the said other person, were to be restored to the said list.

C. Foster for the appellant. The decision of the Revising Barrister, that the voter, *George Arnison*, was not "rated" within 30 & 31 *Vict.* c. 102, sect. 6, sub-sect. 3, was wrong. The firm of "*N. Arnison & Sons*" were rated, and the existing firm consisted of two sons of *Nathan Arnison*, *George*, the voter, being one of the sons. The rating of the firm

was a rating of the individuals who constituted the firm, and who were clearly the parties liable to be rated. Even assuming the description of a number of partners by their conventional name to be an inaccurate mode of describing them, such an inaccuracy is at all events cured by 16 *Vict.* c. 18, s. 75, that section being expressly made applicable to the county occupation franchise by 31 & 32 *Vict.* c. 58, s. 30. It is sufficient that the party misnamed or inaccurately described was intended to be rated. In *Moss* v. *Overseers of St. Michael's, Lichfield* (*a*), A occupied jointly with B, and paid the rates, but B only was assessed to the poor-rate. There, no doubt, it was held that the omission of A's name from the rate was not cured by 6 *Vict.* c. 18, s. 75, but the ground of that decision was, that there was no intention on the part of the overseers to rate A. *Erle*, J., said, "The real question is, whether the party was intended to be rated." A, in that case, was not *called upon* to pay the rate by the overseers, as he must be to bring himself within sect. 75, though no doubt, as matter of fact, he *paid* the rate. Here the intention was to rate the two sons of *Nathan Arnison*, who were members of the firm, and they were called upon to pay the rate.

[KEATING, J. *Nathan Arnison* no doubt intended the two sons he took into partnership to be rated along with him, when he applied to have the rate altered. But the question is, as to the overseers' intention?]

It is true *Nathan Arnison*, when he went to the

(*a*) 1 *Lutw.* 188. *S. C.* 7 *M. & G.* 75.

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overseers, did not give the names of any sons, nor does the case state whether he mentioned that he had sons. The overseers would infer, however, that he had sons from the alteration in the name of the firm. Moreover, the sons were called upon to pay and did pay the rate, which, under the circumstances is, it is submitted, ample evidence of the intention of the overseers to rate them. Suppose the father had died, and after his death the two sons had paid the rate, as it has been paid here, could it afterwards be contended that it was not the overseers' intention that the sons should be rated? The Revising Barrister seems to have thought that it was essential that the *names* of the sons should appear on the rate.

The respondent did not appear.

BOVILL, C.J. In this case, *George Arnison*, the person whose vote was objected to, occupied the premises in question jointly with his brother, *Thomas Bell Arnison*, and the business was carried on by the two brothers jointly, under the name of "*N. Arnison & Sons*," that being the name of the firm as it had formerly existed. No one, except the two brothers, was in occupation of the premises, or used the name of the firm, but the two carried on the business after the retirement of their father, *Nathan Arnison*, under the old name, and for their own benefit. The question then that arises is, whom did the overseers intend to rate? Did they, or did they not, intend to rate the persons who were in occupation of the premises and using the name of the firm, and one or other of whom had, as the case finds, been in the

habit of paying the rates when they were called for? I think it clear that that was their intention. I cannot distinguish the case from the rating of a banking or any other firm. Suppose, for instance, that the rate were on "No. 1, *Fleet Street,*" and in the occupier's column of the rate-book the name of "*Child and Co.*" was inserted. Could any one doubt, in such a case, what was the intention of the overseers, viz., that although they might not be acquainted with the names of all the members of the firm, their intention was to rate them. So under the name of "*N. Arnison and Sons*" here, I apprehend the intention was to describe the persons who carried on the business under that designation. In *Moss* v. *the Overseers of St. Mary, Lichfield* (*a*), *Erle*, C.J., said: "If a partnership firm is charged in the rate, each partner is intended to be charged." That case, indeed, is not in point, as regards the decision, but the *dictum* is applicable here. Whether the description is a sufficient one to enable the overseers to enforce the rate it is not necessary to determine, for if there be any objection in that respect, it is clearly within 6 *Vict.* c. 18, s. 75, as a misnomer or inaccurate description. The decision of the Revising Barrister must therefore be reversed.

KEATING, J. I am of the same opinion, though during the argument I have certainly entertained some doubt; but upon the whole I think the case is brought within the 6 *Vict.* c. 18, s. 75. Originally *Nathan*

(*a*) 14 *L. J. C. P.* 57. See the same case, *Nomine Moss* v. *The Overseers of St. Michael, Lichfield*, 1 *Lutw.* 188; 7 *M. & G.* 75.

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Arnison, the father, carried on the business by himself, and was solely rated. Afterwards, on the occasion of his taking two of his sons into partnership, he went to the overseers and desired them to alter the rating to "*N. Arnison & Sons*," which was accordingly done. The overseer says that no names were given, though one certainly would think it a very likely thing that the reason for the change should be mentioned. This at all events appears, that after the father had retired from the business, when payment of the rates was called for, the payment was made by the existing partners. I think there is sufficient before us to warrant the conclusion that the intention of the overseers was to rate the partners who were then in occupation of the premises. I do not consider the description accurate, nor do I pronounce any opinion as to whether the rate could be enforced; but I think that the 6 *Vict.* c. 18, s. 75, was intended to apply to the case of a person who is *bonâ fide* rated under an inaccurate description, and that it applies here; though, as I have said, I do not consider the case free from doubt.

BRETT, J. The franchise here claimed is that given by sect. 30 of 30 & 31 *Vict.* c. 102, and to entitle the voter it must be made out that, in accordance with sub-sect. 3, he has during the required period been *rated* in respect of the premises. On turning to the rate-book, we find as the description of the persons rated in respect of these premises the name of "*N. Arnison & Sons*;" and the question is whether that description is sufficient to show that this voter was rated. It cannot I think be maintained that "*N. Arnison & Sons*" is an accurate description of "*George*

Arnison and *Thomas Bell Arnison*." It is urged, however, that the want of accuracy is cured by sect. 75 of 6 *Vict.* c. 18, which is expressly made applicable to the occupation franchise for counties by 31 & 32 *Vict.* c. 38, s. 30. The question therefore is whether the case comes within sect. 75. That section is somewhat singularly drawn. The earlier portion of the enactment would seem to apply where the person occupying and liable to be rated has been *bonâ fide* called upon to pay, and paid the rates, although in fact he has never been rated. But then come the concluding words, "any misnomer or inaccurate or insufficient description of the person so occupying or the premises occupied notwithstanding." Those words seem to assume that there is some description or naming of the person on the rate-book, and that, though the description of him may be imperfect or inaccurate, it was intended he should be there described. If so, the appellant must show not only that he has paid the rates, but that he has been in fact rated, and that there has been an attempt made to describe him on the rate-book. Does the appellant show that here? The facts are these. Originally the father was rated alone, and the rate-book described him correctly. Subsequently having taken two sons into partnership he went to the overseers and requested them to alter the name to "*N. Arnison & Sons.*" Unless in doing that his intention was that his sons should be rated, there was no meaning in the act. The material point, however, is, whether he made his intention known to the overseers, and whether they adopted and acted upon it. As to this the statement in the case is somewhat short. The case states that he gave no names to

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the overseers, and is silent as to any further communication between them; but the evidence on this point is this, that the rating having been altered by the overseers in pursuance of the father's request, the sons are subsequently called upon by the overseers for payment of the rates, and that thenceforth they have been in the habit of making the payment. I think, therefore, that there is evidence from which the Court may infer that the overseers did not intend to rate the father alone, but that they intended to rate any of his sons who had become members of the firm; and that there is a sufficient rating. The next question is, whether there is a sufficient description in the rate-book. As to that, I think that, if the overseers did intend to rate the sons, the description that is given, though inaccurate, is sufficient within 6 *Vict.* c. 18, s. 75, and consequently that the decision of the Revising Barrister was erroneous. The point, which seems to have been in his mind, would appear to have been not that it was not the intention of the overseers to rate the sons, but that they were not *named* in the rate, and therefore not duly rated within 30 & 31 *Vict.* c. 102, s. 6: consequently he expunged their names. I think his mistake consisted in not holding that the description though inaccurate was cured by the 6 *Vict.* c. 18, s. 75.

GROVE, J. I agree, but must own that I have entertained some doubt, and should have preferred to have heard the case argued on the other side. My doubt has been first, whether it can be said that there is "a misnomer or inaccurate or insufficient description," where in point of fact there is no description at all

of the person seeking qualification, and secondly, whether in this case there is a description. Upon reflection I think there is. "*N. Arnison & Sons*" is, I think, some description of the sons of *Arnison*; and, if so, the description is made sufficient by 6 *Vict.* c. 18, s. 75. As to the effect of putting the name of a firm on the rate when the object is to rate the members I decline to express any opinion, nor do I think the intention of the overseers would necessarily form the sole guide in all cases. It is enough to say here that I think there is some description. The view which the Revising Barrister appears to me to have taken was, that the appellant not being named, there was no description of him, and consequently no foundation for the application of the 75th section.

Decision reversed.

Attorneys—For appellant *Johnston & Co.*, agents for *Harrison & Little, Penrith.*

BESWICK, Appellant; ALKER, Respondent.

Nov. 13.

A. was minister of a church and entitled to the balance of the rents of the pews after certain deductions for church services made by the churchwardens, who had the duty of letting the seats. The amount was at least £100 a-year. He also occupied the parsonage house, in respect of which he had acquired the right to vote for the borough. He claimed to vote for "freehold land and pew rents." No profit accrued from the land. The case did not show how the pew rents could confer a freehold qualification, but merely reserved the question whether the house was a part of the benefice, which could not be divided so that any remaining part could give the right to vote for the county. *Held*:—That as the case assumed that *A.*'s interest in the pew rents was such as to confer the county vote, and as it was not an interest or estate in a building "occupied by himself" together with the parsonage house within the meaning of 2 *Will.* 4, c. 45, s. 24, the vote must be allowed.

THE Case stated:—

At a Court held at *Preston* for the revision of the list of voters for the north-western division of the county of *Lancaster*, the appellant duly objected to the name of the respondent being retained on the list of persons entitled to vote in the election of members of Parliament for the said division in respect of property situate in the township of *Preston*.

The qualification of the respondent was set out in the said register, as follows:

Alker, George.	*Lisbon Hall, Fishwick.*	Freehold lands and pew rents.	*St. Mary's Church, St. Mary's Street.*

The respondent is minister of St. Mary's church, which is situated within the parliamentary borough of *Preston*. No profit has accrued to him, or is likely to accrue, from the above-named land, but under the "sentence of consecration" of the said church he is entitled to the rents of certain pews and sittings which are let by the churchwardens according to a certain scale, which scale the churchwardens for the time being may, with the consent of the bishop, alter from time

to time as occasion may require; and, after deducting yearly two several sums of £8 15*s.* and £5 for the services of the church, the said churchwardens pay the residue of such pew rents to the minister for the time being of the said church, to be received by him for his own absolute use and benefit, by way of stipend. The sum which the respondent has so received from the above pew rents has always exceeded £100 in the year. The house mentioned on the register as the respondent's place of abode is the parsonage-house of the minister of St. Mary's, and the respondent occupies and is rated for it, and in respect of it has acquired the right to vote for the borough of *Preston*. It was objected, that the said house was a part of his benefice, which benefice could not be divided so that any part of it could confer on the respondent the right to vote for the said division, and that therefore his name should be expunged from the said register.

The Revising Barrister decided that the respondent was entitled to have his name retained on the said register.

If the Court should be of opinion that the above decision was wrong, the register was to be amended by striking out the name of the Rev. *George Alker*.

Six other appeals were consolidated.

Leofric Temple, Q.C., for the appellant. The question is, whether the parsonage-house and the pew-rents are not part and parcel inseparably of one occupation within sect. 24 of 2 *Will.* 4, c. 45; so that the respondent, having the right to vote for the borough, is precluded from voting also for the county in respect of the same. The words of the section are:—"No

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person shall be entitled to vote in the election of a knight . . . in respect of his estate or interest as a freeholder in any house, warehouse, counting-house, shop, or other building occupied by himself, or in any land occupied by himself together with any house," &c., "being either separately or jointly with the land so occupied therewith of such value as would, according to the provisions hereinafter contained, confer on him the right of voting for any city or borough, whether he shall or shall not have actually acquired the right to vote for such city or borough in respect thereof." The claimant receives the pew rents and occupies the house as minister. There must be union of the two. Enjoyment of the one is inseparable from occupation of the other.

[BOVILL, C.J. The words of sect. 24 contemplate land or buildings. How does that include pew-rents ?]

They arise out of land occupied with the house.

[BOVILL, C.J. The case is imperfectly stated. We are not informed how the pew-rents confer a freehold qualification. We must assume that, under some Act of Parliament, they sustain the vote. It is, however, distinctly stated that no profit accrues from the land.]

The minister has possession and control of the church and land.

He referred to *Capel* v. *Aston* (*a*).

(*a*) 2 *Lutw.* 143. *S. C.* 8 *C. B.* 1.

J. E. Gorst, for the respondent, was not called on.

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BOVILL, C.J. No question is raised by the case before us as to the respondent's right to vote for the county, but the sole point for our decision is, whether the case is one which comes within sect. 24 of the Reform Act, 2 *Will.* 4, c. 45, and whether, as the parsonage-house and the pew-rents together constituted the benefice, the respondent's interest came under the description of an estate or interest as a freeholder in a "building occupied by himself," or "land occupied by himself, together with any house, etc.," within the meaning of that section. I am of opinion, on the statement before us, that that section does not apply. The only occupation expressly mentioned is that of the parsonage-house. Then can he be said, in any sense, to "occupy" the pew-rents? There is no statement in the case on this subject, and clearly there is no occupation of the pews themselves. There is nothing, in fact, found on which it is possible to ground any argument. Even the precise nature of the right to pew-rents, or how they constitute a qualification, is not stated, though to that it does not appear that any objection was directed. It is sufficient to say, that the case does not come within sect. 24, and that the decision must be affirmed.

BRETT, J. It is difficult to gather from the case the real facts. However, it seems to be taken for granted, and must, for the present purpose, be assumed that such a freehold interest and qualification, in respect of pew-rents, existed, as would, but for the objection taken, have entitled the respondent to vote

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for the county. So far, it is a question of freehold ownership. The next fact found is, that the claimant is in actual occupation of a house within a borough, which confers a title to vote for the borough. Then he claims the vote for the county, and describes his interest as "freehold land and pew-rents." We do not know precisely how these give the qualification, but must assume that by some Act of Parliament, under which the rents are collected, they are in the nature of a rent-charge, or that a sufficient freehold interest in the church and pew-rents is conferred on the minister. Then the objection is not that he votes for the borough, but that he is not to vote for the county, because he occupies the parsonage, and also possesses contemporaneously, and it is contended occupies with it, the freehold interest first mentioned. The words of sect. 24 become very material, "occupied by himself, with," &c. The case finds that no profit accrues from the land, and does not find that the incumbent "occupies" the church. The claim is in respect of the freehold interest. It is argued that the church and house together appear, from the title under which they are held, to be necessarily "occupied" together. But the church would confer no title, as a building, to vote for the borough, while he does, in fact, vote for it in respect of the house. His claim to vote for the county is, therefore, in respect of another and different qualification, and under these circumstances we cannot say that sect. 24 applies so as to prevent his doing so, because at the same time he possesses the qualification for the borough in respect of the house he occupies, though both qualifications may be held under the same title.

GROVE, J., concurred.

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DENMAN, J. I think that the occupation of the parsonage, with the enjoyment of the pew-rents, which I assume here to confer a county qualification, is not a case contemplated by sect. 24.

Attorneys—For Appellant, *Griffith & Brownlow*, agents for *Edelston, Preston.*

For Respondent, *Kimber & Ellis.*

EARL BEAUCHAMP, Appellant; THE OVERSEERS OF MADRESFIELD, Respondents.

THE MARQUIS OF SALISBURY, Appellant; THE OVERSEERS OF SOUTH MIMS, Respondents.

The same Appellant; BONTEMS, Respondent.

The same Appellant; BULWER, Respondent.

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Nov. 15.

Peers of Parliament have no right to vote at elections of members of the House of Commons, and are, therefore, not entitled to be placed on the register of voters.

THE case stated:—

At a Court held for the revision of the lists of voters for the county of *Worcester* (western division), at *Malvern Link*, in the said western division, for the revision of the list of voters for the parish of *Madresfield*, in the said division, the name of the Right

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Honourable *Frederick*, Earl *Beauchamp*, appeared in the list published by the overseers of the said parish of persons claiming to vote in the election of two Knights of the Shire for the said division of the said county, in respect of property within the said parish.

The following is a copy of the said claim:—

Lygon, The Right Honourable Frederick Earl Beauchamp.	*Madresfield Court, Malvern.*	Freehold house and land.	*Madresfield Court.*

No objection was made to the name of the said claimant on the said list, but as it was proved to the Revising Barrister that the said claimant was a Peer of Parliament, and had taken his seat in the House of Lords, the Revising Barrister decided that he was not entitled in law to have his name inserted in the register of voters for the said division, and expunged the same.

If the Court should be of opinion that this said claimant was not entitled to have his name inserted in the said register of voters, then his said name was to remain expunged, but if of a contrary opinion, then the name of the said claimant was to be inserted in the said register of voters.

A. Wills, Q.C., for the appellant. It must be admitted that the course of authorities is against the claim. In early times, undoubtedly, some Acts of Parliament, and also a few precedents of writs gave some foundation for the notion that Peers of Parliament might vote in the election of a member of

the Commons. There is evidence that they took part in proceedings of the Courts relating to the election, &c., of Knights of the Shire. The statute, 7 *Hen.* 4, c. 15, directed the election of Knights by "all that be there present," &c. *Prynne's Parliamentary Writs* (*a*). Those precedents are such as were relied on in discussion of the claim by women to the franchise, *Chorlton* v. *Lings* (*b*). They were of equal weight on that question, and no more so than on this argument, but were treated by the Court as exceptional and irregular. They related exclusively to the county of *York*. *Prynne* himself says, "they are very remarkable, different from any I have seen in other shires of England" (*a*).

Such instances occurred before 25 *Hen.* 6. "But in Anno 25 *Hen.* 6, this antient form and manner of elections and of indentures was changed and varied from these fore-cited, being made and sealed by the Freeholders of the County, not by noblemen's, ladies' and others' attorneys" (*c*). After that time one regular course has, in this respect, been followed. They are, however, the only materials to be found which give any countenance to the idea that Peers systematically, or of right, interfered in, or had to do with the election of Members of Parliament. In the statute, 8 *Hen.* 6, c. 7, though in the enacting part the word "people" is used to describe the electors, the preamble refers to "Knights and Squires," as the highest in rank intended.

(*a*) Part 3, p. 152, *Brevia Parliamentaria Rediviva*. See also *Ancient Parl. Elections*, by *Homeshaw Cox*, p. 128. See also, *Elliott Reg.*, 2nd Edit. 613, note.

(*b*) 1 *Hopw. & Colt.* 1.

(*c*) *Prynne*, *Ibid*, p. 154.

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Blackstone (*a*) lays down: "The Commons consist of all such men of property in the kingdom as have not seats in the House of Lords." *Coke* (*b*): "The Commons are in legall understanding taken for the franchise tenants or freeholders of the counties. And whosoever is not a Lord .... of Parliament and of the Lords' House, is of the House of Commons either in person or by representation partly coagmentative and partly representative." Again, in his commentary (*c*) on the phrase "*per pares*" in Magna Charta, "and as there be divers degrees of notabilitie as Dukes, Marquesses, &c., so of the Commons of the Realm there be Knights, Esquires, Gentlemen, &c., and yet all of them of the Commons, &c.;" and later on "so is it of the Commons;" from which it may be inferred that Lords cannot be of the Commons. The form of writ for election shows that the knights must be of the Commons (*d*).

If we turn to the law of Parliament the authorities show that each House declares the law applicable to its own constitution and acts as a Court. *Blackstone* (*e*) describes the constituent parts of Parliament: "The Lords Spiritual, the Lords Temporal, who sit together with the King in one house and the Commons who sit by themselves in another." *Coke* (*f*) to the like effect of the law of Parliament, says: "It is that all weighty matters in any Parliament .... ought to be determined .... concerning the Peers of the Realm by the King and all the Lords Spirituall and Temporall and the

(*a*) *Vol.* 1, p. 158.
(*b*) 4 *Inst.*, p. 2.
(*c*) 2 *Inst.* p. 29*a*.
(*d*) *Heywood*, 1.
(*e*) *Vol.* 1, p. 153.
(*f*) 4 *Inst.*, p. 2.

like *pari ratione* is for the Commons for anything moved or done in the House of Commons."

[BRETT, J. Do you admit that the House of Commons has power to declare who shall elect it?]

Yes, to declare though not to create.

[KEATING, J. By 31 & 32 *Vict.* c. 125, s. 26, "the principles, practice, and rules on which Committees of the House of Commons have heretofore acted in dealing with Election Petitions shall be observed so far as may be by the Court and Judge in the case of Election Petitions." That does not apply to revising cases, but comes near to it.

GROVE, J. You mean that the House does no more than judicially determine who shall elect].

Yes, that is coupled with what is laid down that Parliament is supreme and its decision not subject to appeal.

Coke (*a*) declares: "and this is the reason that Judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common law, but *secundum legem et consuetudinem Parliamenti*," "and the Commons in their House have power of judicature." Again, "the House of Commons is a distinct Court" (*b*). "It prorogues itself, though, when about to be dissolved, the Commons are called to the House of Lords" (*c*). "All Justices of England

(*a*) 4 *Inst.*, p. 15.
(*b*) 4 *Inst.*, p. 23.
(*c*) *Ibid*, p. 28.

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and Barons of the Exchequer are assistants to the Lords, &c. Neither does it belong to them (as hath been said) to judge of any law custome or privilege of Parliament" (*a*); and he refers to the Rolls of Parliament and other records as containing that law.

Turning then to the Rolls of Parliament we find Resolutions of the House of Commons collected in *Comyn's Digest.* "No Peer hath a right to vote at elections," Resolved *nem. con.*, 14*th Dec.*, 1699 & 13*th Feb.*, 1700; resolved 24*th Oct.*, 1702 (*b*). A resolution to the like effect is passed at the commencement of every session since.

A second resolution follows in *Comyns*, "If a Peer or lord-lieutenant of a county concerns himself in elections, it is an infringement of the liberties of the Commons." Resolved, *nem. con.*, 15th *February*, 1700, and resolved, 24th *October*, 1702.

[BRETT, J. Does he cite any authority ?]

None but the resolutions themselves which *Comyns* gives as a statement of the law. Except and from the date of *Prynne's Precedents*, relating to *Yorkshire*, down to the year 1699, no instance of interference by a peer with an election for the Commons is recorded. In 1699, on occasion of the *Malden* petition, proof was given of the *Earl of Manchester* voting. The House confirmed the election, but passed the resolution cited (*c*).

[KEATING, J. Is there any instance since then of a peer's vote being allowed ?]

(*a*) 4 *Inst.*, p. 50. (*b*) *Comyns' Digest Parliament, D.* 10.
(*c*) 13 *Com. Jour.*, p. 64.

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No, there are several instances of votes of the kind being disallowed by committees, and given up by counsel of eminence without argument. *Heywood* (*a*) describes the occasion of the passing of the resolution in 1801, in the terms now adopted in the Standing Orders of the House of Commons, "After the union of the kingdoms of Great Britain and Ireland, it became necessary to make some alterations in the Standing Orders of the House, and on the 30th *October*, 1801, some motions being made respecting the voting and interfering of peers at elections, the debate was adjourned, and a committee appointed to report. On the 17th *November*, 1801, the committee reported several resolutions, which afterwards, 27th *April*, 1802, were adopted, and made Standing Orders of the House, and as such have been repeated at the beginning of every subsequent session, 'Resolved that no peer of this realm, except such peer of that part of the United Kingdom called Ireland, as shall, for the time being, be actually elected, and shall not have declined to serve for any county, city, or borough of Great Britain, hath any right to give his vote in the election of any member to serve in Parliament.' 'Resolved, that it is a high infringement of the liberties and privileges of the Commons of the United Kingdom for any lord of Parliament, or other peer or prelate, not being a peer of Ireland at the time elected, and not having declined to serve for any county, city, or borough of Great Britain, to concern himself in the election of members to serve for the Commons in Par-

(*a*) *County Elections*, p. 317, 2nd Edit. See also *May's Law and Pr. of Parliament*, 6th Edit, p. 604, note 3.

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liament, except only such peer of Ireland at such elections in Great Britain respectively, where such peer shall appear as a candidate, or by himself, or any other be proposed to be elected; or for any lord-lieutenant or governor of any county to avail himself of any authority derived from his commission to influence the election of any member to serve for the Commons in Parliament.' In the case of *Banbury*, 1808, the vote of an Irish peer was objected to, and given up as too clear a case to be argued, upon the words of the before-mentioned Standing Orders."

On the other hand, no counter resolution of the House of Lords is to be found in their journals, though those passed by the Commons must (perhaps not formally) have come to the knowledge of the House of Lords.

They have been discussed in the House of Lords in debate, especially on the 27th of *June*, 1853, in which it was admitted to be the immemorial usage, independent of the resolutions (*a*).

The occasion was a debate on the recent *Tynemouth* election, in which it had been suggested that the *Duke of Northumberland* had taken some part. *Lord Campbell* said that, as his noble and learned friend (*Lord Brougham*) had broached a question of great constitutional importance, and one which he had frequently and deliberately considered, he thought himself bound to express his opinion upon it. The question was, whether a peer had any right to vote for a representative in the Commons' House of Parliament. He was clearly of opinion that a peer had no such

(*a*) 128 *Hans. Deb.* 3rd Series, 790.

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right or power. He placed no importance at all upon the resolution of the House of Commons. That House could not make laws. It might declare what the law was, but it could not, by any resolution it might pass, alter the constitution of the country: and the case of the lord-lieutenants showed that the resolution against peers, by itself, had no weight. But irrespective of that resolution, by immemorial usage, by authority, and by reason, he was clearly of opinion that not one of their lordships, who sat there by hereditary right, or by grant of the Crown, had any right to interfere with an election of a representative of the people. That was the House of Peers,—the other was the Commons' House of Parliament, and it was for the Commons to send their representatives there to act for them, to grant the supplies, and to give their opinions upon Acts of Parliament, and the general legislation of the country. Their lordships legislated in that House by hereditary right; but, having that right, they should be contented with it, and not send forth a groundless claim to be represented in the other House. He cordially supported the motion."

Lord *Brougham* "hoped that his noble and learned friend would not believe that he entertained the notion that a peer had a right to vote in the election of a member of the House of Commons. He never dreamt of such a thing. He mentioned the case of the Duke of *Norfolk* to show the difference of opinion which existed upon the subject; and all he wished to protest against was, the presumed validity of the resolution of the House of Commons that it was a breach of privilege for a peer to interfere in an election."

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Again, on the 5th of *July*, 1858 (*a*), in answer to Lord *Derby's* assertion to the contrary, on the occasion of the Jewish Disabilities Bill, Lord *Campbell* observed, "A peer has no right to vote by the common law of England for the election of members of the House of Commons." Later in the debate he says, "The resolution only declares the common law." Lord *Derby*, in reply, vouched Lord *Lyndhurst* in support of his view. That learned lord spoke afterwards in the debate, but did not allude to this subject—though Lord *Campbell*, in his own speech (preceding Lord *Lyndhurst's*) had reiterated his opinion.

The practice of the House of Commons appears, in the cases collected by Mr. *Elliott* (*b*), who mentions, besides the election of *Malden*, the election for *Dornoch*, 15th *December*, 1741, where the vote of Lord *Cromartie*, a Scotch peer, was rejected; the elections for *Banbury* and *Droitwich*, where the votes of Irish peers were struck off.

These resolutions of the House, are, no doubt, of rather a mixed character—partly judicial and partly protesting.

Further, in this case the Revising Barrister struck off the name "*mero motu*," without objection made to the vote.

[BOVILL, C.J. That point is not raised.

KEATING, J. The only question put to the Court is, whether the claimant was entitled to have his name inserted.]

(*a*) 151 *Hans. Deb.*, 3rd Series, p. 926. (*b*) p. 261, 2nd Edn.

G. Browne, for the respondent, referred to *Wilson* v. *Town Clerk of Salford* (*a*).

Wills. The only point there decided was as to the right of a woman to appeal. The Court abstained from expressing an opinion on the question of whether notice of objection was necessary.

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THERE was an addition to the statement of the former case, as follows :—

[It was admitted that the qualification of the claimant as a freeholder was sufficient in law to entitle him to have his name inserted.]

Manisty, Q.C. (*A. L. Smith* with him), admitted that he could not sustain the vote.

An additional obstacle is offered by sect. 26 of The Election Petitions Acts, 31 & 32 *Vict.* c. 125.

[BOVILL, C.J. We are not at this moment acting under that statute. I, personally, have no power to sit under it.]

Yet, if a peer voted, and objection were taken, the question would come before this Court, which would be bound to strike off the vote.

[KEATING, J. This Court has had to consider the word "principles" under that statute (*b*).]

(*a*) 1 *Hopw. & Colt.* 44.

(*b*) *L. R.*, 6 *C. P.* 147.

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It is not admitted, that if the question were raised in Parliament it would be free from doubt.

He referred to *Heywood* (*a*) :—

"This resolution has been repeated at the beginning of every session until the union of Great Britain with Ireland, but has never been recognized by the House of Peers."

H. James, Q.C., proposed to call attention to several of the statutes to show that the two Houses were kept quite distinct by statute.

[BOVILL, C.J., inquired what was the subject of the reference in *Rogers on Elections* (*b*) to *Winchester*, 10 *Journals*, 447.]

That was the case of an election for *Winchester*. In the argument which was heard at the Bar of the House, the point was given up by counsel in arguing.

[He was stopped by the Court.]

BOVILL, C.J. From the course which has been taken by the learned counsel, and most properly taken, it might seem hardly necessary to do more than give formal judgment for the respondents, inasmuch as it is admitted that argument in favour of the vote is wholly precluded. As, however, the matter has been brought before the Court for decision, it is desirable that our reasons should be expressed. The House of Com-

(*a*) p. 316. (*b*) p. 166, 9th Edn.

mons, originally in the full House, and subsequently by its Committees acting as a Court, has always been accustomed to decide all matters connected with the election of its members, and has exercised the jurisdiction exclusively up to the period when the power was transferred to the election Judges.

In 1669, on the question of the validity of a vote given by the *Earl of Manchester* at the *Malden* election, the House in the exercise of that judicial power passed a resolution in these terms: "that no peer of this kingdom hath any right to give his vote at the election of any member to serve in parliament." It was a resolution not merely expressing the opinion of the House, but deciding upon the right of peers to vote. A similar resolution has been repeated every session to the present day. Other resolutions were passed in 1700 and 1702, and especially one in 1802, which is the one now in use, "that it is a high infringement of the liberties and privileges of the Commons of the United Kingdom for any lord of Parliament, or other peer or prelate, not being a peer of *Ireland* at the time elected, and not having declined to serve for any county, city, or borough of *Great Britain*, to concern himself in the election of members to serve for the Commons in Parliament, except only any peer of *Ireland* at such elections in *Great Britain* respectively where such peer shall appear as a candidate, or by himself, or any others be proposed to be elected; or for any lord lieutenant or governor of any county to avail himself of any authority derived from his commission to influence the election of any member to serve for the Commons in Parliament."

It is not now necessary to enter into the constitu-

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tional reasons for peers being excluded from being voters. The resolutions of the House of Commons referred to were not resolutions as to who ought to vote, but were declaratory of the law as it was. Of course the House of Commons could not alone, without the assent of the other branches of the Legislature, alter its constitution, but as a Court sitting judicially it was bound to declare the law. Committees of the House appointed to inquire into the validity of elections have from time to time acted on the law as declared by such resolutions, and have decided case after case, counsel conceding the point before them without argument. In effect, the resolutions and decisions in a uniform course amounted to a positive exclusion of peers from the right to vote. Yet it has been submitted to, and for upwards of 170 years no instance can be found of any peer being allowed to vote, whilst every text-book on the subject lays down the proposition that no peer of Parliament is entitled to vote. There is the authority of Lord *Coke*, of Chief Baron *Comyns*, of Mr. Justice *Blackstone*, and of Lords *Campbell* and *Brougham* to the same effect; therefore, in whatever way the question was looked at, it would seem to be conclusively settled against the existence of any such right; and this view of the law has been acquiesced in for upwards of a century and a-half. Independently of "The Parliamentary Elections Act, 1868," I have no hesitation in declaring my opinion that a peer has no right to vote at the election of members of the House of Commons. Formerly, if a peer had voted, and the matter had gone, as the practice was originally, before the House of Commons, or, as afterwards, under Grenville's Act, before a com-

mittee of that House, the vote would certainly have been struck off. What, in such a case, would an election Judge now do? He would have no power to act otherwise than in accordance with what had been the practice of committees of the House of Commons, and must strike off the vote. Abstaining, as I desire to do, from saying what is the proper construction of the 26th section of "The Parliamentary Elections Act," I am of opinion here that peers have not the right which they have claimed in these cases and these appeals must be dismissed.

KEATING, J. I am of the same opinion. There can be no doubt that the authorities are all one way. We have, in the first place, the authority of the House of Commons declaring the law on this particular point. I do not suggest that the House of Commons alone has any right to make the law; but, looking at the resolution as a declaration of what the law was, it is, I think, entitled to every respect. There is, moreover, authority and uniform practice to corroborate it. Besides those referred to, Mr. *James* has called my attention to the statute 1 *Hen.* 5, c. 1, intituled, What sort of People shall be chosen, and who shall be the Choosers of the Knights and Burgesses of the Parliament, by which it is enacted, "that the knights of the shire be not chosen unless they be resident within the shire;" "and that *the knights and esquires and others which shall be choosers* of those knights of the shire be also resident," &c. That shows that the electors, who were to be knights and esquires and others, were not to be of a higher rank than knights, and is an authority for excluding peers from voting for knights of the shire.

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There is also the authority of Lord *Coke*, justifying the resolution of the House as a correct declaration of what was the law. Furthermore, the resolution itself has been imported into his digest by Chief Baron *Comyns*, and it has therefore received the stamp of his high authority. There is also the authority of Lords *Campbell* and *Brougham*, and, the strongest of all authorities, uninterrupted usage for centuries, against the right of a peer to vote at parliamentary elections. Not a single authority in favour of such right has been found, except what is stated in *Heywood on County Elections*, as to the right having once existed, but which, when traced to its source, viz.. *Prynne's Returns*, is of no weight.

Reference was made by me during the argument, to the 26th sect. of the Parliamentary Elections Act, 1868, but I do not put my judgment on that; for, although I was at first under the impression that this Court, in the case of the *Norwich* Election Petition, *Stevens* v. *Tillett* (*a*), had construed the large word "principles" to apply to a similar case, I am convinced, on further recollection, that there was nothing in the judgment to preclude the argument that the word was only intended to include matters of procedure before the Committees of the House; and the question, should it arise, is one open for consideration.

For the reasons I have mentioned, I agree with my Lord, that the Revising Barristers were right in their decisions in these cases; and I only wish to add, that I entirely approve of the course pursued by the learned counsel for the appellants in candidly admitting that

(*a*) *L. R.*, 6 *C. P.* 147.

the authorities were against them. I have yet to learn that it is other than the duty of counsel in an unarguable case to admit that it is so, for their great function is to assist the Court in arriving at a right judgment.

BRETT, J. I cannot but think that the Court has been put in a very difficult position by the course which the counsel for the appellants have pursued in these cases. I confess I had from the first considerable doubt whether the claims could be supported, but in the course of the argument I thought it right to make such suggestions as occurred to me in order to test the propositions put before us, especially as those made by counsel were wholly against the case they had to make out, and not merely for the purpose of admitting a case to be met by argument. I agree generally in what has been said of the duty of counsel, but I cannot help thinking it would have been better simply to say at once the case was not arguable. I make that observation with the highest respect for the learned counsel who appeared for the appellants.

Two propositions were put forward in argument: 1. That by common law and immemorial usage, Peers had not the right to vote. 2ndly, that even though it could be shown that they had the right at common law, yet they were debarred by resolutions of the House of Commons and the conformable decisions of Commitees made binding by sect. 26 of the Parliamentary Elections Act, 1868. If our decision depended on this last ground, I for one should hesitate to be a party to it, for I doubt if the 26th section be intended to refer to anything more than matters of

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procedure. It contemplates rules being made pursuant to the 25th section, and these could only be made as to procedure, and not for the purpose of altering the franchise. The first ground, however, is the one we must consider. It is said that there is immemorial usage against the right and that this is proved by a judicial decision of the House of Commons given on the *Malden* election petition; and assuming that before the Grenville Act (10 *Geo.* 3, c. 16), the decisions of the House on election cases were judicial, I apprehend that and similar decisions would be entitled to the highest respect, and would be binding on this Court unless something of equal weight to the contrary could be shown. But one remark must be made. It may be that the resolution then come to was intended as a decision of what the law was at common law, or it may be that the House intended to decide by such resolution as a resolution only of the House. If the last be the case, I protest against the idea that it is binding as such resolution on this Court, or that this Court should adopt it. I must own that I think there is some colour for doubting that the resolution was a judicial decision or was so intended by the House, because it has been repeated every session, and that, too, after the Grenville Act had been passed and the House of Commons had given up the trial of election petitions in the full House. But the counsel for the appellants have admitted that it was a judicial decision; and after that, and their further admission that with all their research they have not found any authority prior in date to that resolution in support of the right of Peers to vote at elections, there is strong evidence of the immemorial usage relied upon against

the existence of any such right. Therefore, irrespectively of the resolution, I think that the decision of the House of Commons was right, and that it is the law of this country, and was so before that decision and resolution. For that reason only I concur in the judgment of the Court. It follows that if Peers have no right to vote, they cannot be on the register, for that is a register of voters only.

GROVE, J. I am of the same opinion. It is difficult to pronounce judgment where one side only of the case has been argued. The respondents might have brought before our notice matters of greater historic force and value. Strong constitutional reasons might also have been urged. I abstain from mentioning such as occur to me, because they would be subjected to no reply from the bar to modify or change my opinion. I only mention it because it may otherwise appear to have been unnoticed. The absence of authority for the claim, and the admissions of those who desired, if they could, to support it, are sufficient to justify us in deciding against it.

Decisions affirmed.

Attorneys.—For Lord *Beauchamp, Young, Maples, Teasdale, Nelson, & Co.*
For Lord *Salisbury, Nicholson & Herbert.*
For respondents, *Wyatt, Hoskins & Hooker.*

WEBSTER, Appellant; OVERSEERS OF ASHTON-UNDER-LYNE, Respondents.

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Nov. 19.

Grant of a rent-charge to *A*. *B*. and *C*. and their heirs, to hold to the said *A*. *B*. and *C*. their heirs and assigns, to the use of the said *A*. *B*. and *C*., their heirs and assigns for ever as tenants in common and in equal shares. *Held*:—That this was no statute use, but that the grantees were in, at the common law, as tenants in common, and not as joint-tenants; consequently, that until rent had been paid there was no "actual possession" within sec. 26, of the 2 *W*. 4, c. 45.

AT a Court held at *Ashton-under-Lyne* for the purpose of revising the list of voters for the *Ashton-under-Lyne* Polling District, before the Barrister appointed to revise the list of voters for the South-Eastern Division of the county of *Lancaster*, *Thomas Webster*, duly objected to the name of *Robert Byron Orme* being inserted in the list of voters for the said division of the said county.

The claim of the said *Robert Byron Orme* was as follows:—

Orme, Robert Byron.	*Stamford Street, Ashton-under Lyne.*	One-third share of rent-charge issuing from freehold land and buildings.	*Fleet Street, William Orme,* Owner.

The following facts were established by the evidence:—

By an indenture made and dated the 13th day of *October*, 1871, and made between the said *William Orme* of the one part, and the said *Robert Byron Orme*, *Enoch Lawton*, and *James Kerfoot* of the other part, the said *William Orme* being seised in fee simple in possession of certain lands, messuages, and hereditaments in *Ashton-under-Lyne* aforesaid, granted unto the said *Robert Byron Orme*, *Enoch Lawton*, and *James*

Kerfoot and their heirs one perpetual yearly rent-charge of £9, to be payable clear of all deductions (except property or income tax) by equal half-yearly payments on the 5th day of *April* and the 5th day of *October* in each year, and the first payment to be due on the 5th day of *April* then next, and to be issuing from and out of and charged and chargeable upon the said lands, messuages, and hereditaments, to hold the said rent-charge unto the said *Robert Byron Orme, Enoch Lawton*, and *James Kerfoot*, their heirs and assigns, to the use of the said *Robert Byron Orme, Enoch Lawton*, and *James Kerfoot*, their heirs and assigns for ever, as tenants in common and in equal shares.

There was a covenant by the said *William Orme*, with the said *Robert Byron Orme, Enoch Lawton*, and *James Kerfoot*, to pay the said rent-charge at the times and in manner appointed for payment thereof, and a power of distress over the said lands, messuages, and hereditaments, in case of non-payment.

The moiety of the said rent-charge of £9 due on the 5th day of *April*, 1872, was paid by the said *William Orme* to and equally divided between the said *Robert Byron Orme, Enoch Lawton*, and *James Kerfoot*.

It was contended by the objector that the said *Robert Byron Orme* was not in the actual possession of the said rent-charge for six calendar months previous to the last day of *July*, 1872, as required by the 2 *Will.* 4, c. 45.

It was contended by the party objected to, upon the authority of *Heelis* v. *Blain* (*a*), that the Statute of Uses (27 *Hen.* 8, c. 10) operated to give to the said

(*a*) *Hopw. & Ph.* 189. *S. C.* 18 *C. B. N. S.* 90.

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party objected to, and the said *Enoch Lawton* and *James Kerfoot*, the actual possession of the said rent-charge on the execution of the said indenture.

The Revising Barrister held, upon the authority of that case, that the claim was good.

If the Court should be of opinion that the decision of the Revising Barrister was wrong, the register was to be amended by erasing the name of the said *Robert Byron Orme* from the said list.

The appeals of *Enoch Lawton* and *James Kerfoot* were consolidated with the above appeal.

Herschell, Q.C., for the appellant. The question in this case turns on the effect to be given to the words "actual possession" in the 26th section of the Reform Act. It is admitted on the other side that the claimant has not had "actual possession" of the rent-charge, in the sense of possession in fact by perception of the rent, for the required period, so as to bring the case within *Murray* v. *Thornley* (*a*). It is said, however, that constructively he has had such possession in accordance with the doctrine of *Heelis* v. *Blain* (*b*), where a deed operating under the Statute of Uses was held to confer on *cestui que use* a possession amounting to "actual possession" within the Reform Act. The question therefore comes to this: Does the claimant in the present case take simply at common law, or is he in "actual possession" by virtue of the Statute of Uses? It is submitted, both on authority and principle, that he takes simply at common law, and that

(*a*) 1 *Lutw.* 496; *S. C.* 4 *C. B.* 217.

(*b*) *Hopw. & Ph.* 189; *S. C.*, 18 *C. B. N. S.* 90.

the Statute of Uses has no application. It must, indeed, be admitted that if this were a grant to A. to the use of B., the Statute of Uses would execute the use in B., and the case would be within the principle of *Heelis* v. *Blain* (*c*), assuming that case to have been correctly decided. But this is not that case. This is the case of a grant to A. to the use of A., and in such a case there was no necessity for the Statute of Uses, since the use as well as the estate would be vested in A. by the common law assurance. That is made still clearer by considering how the case would have stood before the Statute of Uses was passed. The effect of limiting the use as well as the estate to A. would have been to prevent the Court of Chancery from implying a resulting use in favour of the grantor, so that A. would thereby have obtained both the legal and beneficial interest, even though the transfer to A. had been made without consideration. Then upon the words of the statute it is equally plain. The case is neither within the words nor within their intendment. The Statute of Uses was only intended to apply in those cases where *cestui que use* was a different person from the feoffee or releasee to uses. The object which the statute aimed at was to annex the use to the estate where, previously to the statute, they were in different persons, and thus to prevent the mischiefs which were conceived to arise from their separation.

[GROVE, J. In *Sanders on Uses*, 5th ed. p. 89, it is said "The statute says, 'that where any person or per-

(*c*) *Hopw. & Ph.* 189. *S. C.* 18 *C. B. N. S.* 90.

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sons stand or be seised, &c., to the use, confidence, or trust of any *other* person or persons, &c.:' and therefore, if a use be limited to a feoffee, conuzee, recoveror, or releasee, such use, *generally speaking*, is not executed by the statute, but the feoffee, &c., is in by the common law."]

An illustration of the general principle there enunciated is given at p. 91 of the same work, which seems much in point here: "If an estate be conveyed to A., B., C., and their heirs to hold unto the said A., B., and C., their heirs and assigns to the use of the said A., B., and C., for and during the natural lives of them and the life and lives of the survivor and survivors of them, it should seem that this is not a statute use, but that A., B., and C. will take an estate of freehold for their lives at the common law. In *Gilbert on Uses and Trusts*, 3rd ed. pp. 127, 128, it is said: "But if an estate be granted to the husband and wife, *a bend.* to the use of them and the heirs of their bodies, this is an estate-tail vested in the husband and wife; but this is not a grant of an use divided from the estate, but a grant of the estate and the use to the same person." *Jenkins* v. *Young* (*a*) and *Meredith* v. *Joans* (*b*) are cited by *Gilbert* for that proposition, and in a note to the above passage, Lord *St. Leonards* says, "It is not a use divided from the estate, as where it is limited to a stranger, but the use and estate go together, wherefore it is all one, as if the limitation had been to them and the heirs of their bodies:" and he refers to an opinion of Mr. *Booth* in 2 *Cas. and Opin.* 281. The general

(*a*) *Cro. Car.* 230.

(*b*) *Cro. Car.* 244.

principle mentioned in *Sanders*, to which Mr. Justice *Grove* has referred, seems to be now authoritatively settled, and there is no ground for saying that this case constitutes any exception to the general principle.

Mellor (*K. Digby* with him) for the respondent. It is admitted that the general principle is correctly stated in *Bacon on Uses*, p. 63, *viz.*, "That the statute ought to be expounded, that where the party seised to the use and the *cestui que use* is one person, he never taketh by the statute, except there be a direct *impossibility* or *impertinency* for the use to take effect by the common law. Here, however, the limitations of the estates in the rent-charge which the deed creates by its common law operation, differ essentially from the use declared thereon, which is executed by the statute. The estate is limited to the three persons as joint tenants, while the use, though declared in favour of the same three persons, is executed in them as tenants in common. The alteration of the character of the interests which the grantees take in the use from that which they take in the estate is such as to render them *other* persons within the meaning of the statute.

[BOVILL, C. J. Is not the whole *habendum* to be read together as one limitation to the three persons as tenants in common ?]

It is submitted that it is not. The case of *Jenkins* v. *Young* (*a*) further reported *nomine Meredith* v.

(*a*) *Cro. Car.* 230.

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Joans (*a*) does not govern the present. There the limitation was to husband and wife to the *use* of them and *the heirs of their bodies*, and for want of such issue remainder to E. M. and his heirs: the Court in that case to effect the intention of the parties rejected the word "use," and treated it as an estate tail in husband and wife at common law. But the whole question there was one of intention. Moreover the whole fee was not given to the husband and wife; for, if it had been, it is submitted that the use of the estate tail would have been executed by the statute. For that proposition there is authority.

In *Cruise's Digest*, 4th ed., Title xi. Use, ch. iii. s. 30, it is said: "There are, however, some cases where the same person may be seised to a use, and also *cestui que use*. Thus, if a man makes a feoffment in fee to one, to the use of him and the heirs of his body; in this case, for the benefit of the issue the statute, according to the limitation of the uses, divests the estate vested in him by the common law, and executes the same in himself, by force of the statute. And yet the same is out of the words of the statute, which are—'to the use of any other person.' And here he is seised to the use of himself. But the statute has always been beneficially expounded, to satisfy the intention of the parties, which is the direction of the use, according to the rule of law." In support of that he cites *Bacon on Uses*, p. 63, and *Sammes' case* (*b*).

[BOVILL, C.B. The decision in *Sammes' case* was not on the point to which *Cruise* refers.]

(*a*) *Cro. Car.* 244. (*b*) 13 *Rep.* 56.

It was not. But the proposition is distinctly stated as being law, and does not appear to have been ever questioned. In *Bacon on Uses*, p. 63, it is said: "If I enfeoff I. S. in fee to the use of him in tail, and then to the use of I. D. in fee, or covenant to stand seised to the use of myself in tail, and to the use of my wife in fee; in both these cases the estate tail is executed by this statute; because an estate tail cannot be re-occupied out of a fee-simple, being a new estate, and not like a particular estate for life or years, which are but portions of the absolute fee." In *Sanders on Uses*, p. 92, it is said: "Where the use is limited to the feoffee in tail out of his own seisin *in fee*, and the remainder over to another, as if a feoffment be made to J. S. in fee, to the use of himself in tail, with remainder to D. in fee; or if J. S. covenant to stand seised to the use of himself in tail, with remainder to the use of his wife in fee; in both these cases the estates tail limited to J. S. are executed by the statute." *Sanders* then proceeds to draw a distinction as to the case where the whole fee is not limited in the first instance, which is material as distinguishing the present case from *Jenkins* v. *Young* (*a*). "But I apprehend, that the construction would have been different in the case of the feoffment, *if the whole seisin had not been limited to the feoffee;* thus, if the feoffment had been made to J. S. generally, *habendum* to the use of *himself in tail*, with remainder to the use of A. B. in fee. Now, in this case, J. S. has not a seisin to serve the use to A. B.; and therefore if the remainder to him can take effect at all, it must take effect by the livery

(*a*) *Cro. Car.* 230.

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made to J. S. in the course of possession by the common law." In *Bacon on Uses*, p. 64, it is said: "Like law, if I enfeoff a bishop and his heirs to the use of himself and his successors, he is in by the statute in right of his see."

[BOVILL, C.J. That is a case where the words *other* persons in the statute are satisfied.]

The case put by *Sanders*, of an estate "conveyed to A., B., and C., and their heirs, to hold unto the said A., B., C., their heirs and assigns, to the use of the said A., B., and C.," during their natural lives, and the life and lives of the survivor and survivors is distinguishable, for there the whole fee is not exhausted as it is here; and at all events, there is the broad distinction that there the limitation of the estate and use are both joint, whereas here the *cestuis que use* clearly take the use as tenants in common, while the limitation of the estate to them seems as clearly to be joint.

[DENMAN, J. In parag. vi. of Mr. *Butler's* 231st note to *Co. Litt.* 271 *b* (272 *a*), it is said, "To raise an use under the statute, the possession or seisin to serve the uses must be in some person distinct from the *cestui que use*; as the statute requires that the person seised to the use, and the person to whom the use is limited, should be different persons; so that, if the possession is conveyed, and the use limited to the same person, *at least if the use is limited in fee simple*, that is not an use executed by the statute, but the party is in by the common law; for the statute mentions those cases only, where "any person or persons stand seised

to the use of any other person or persons." That rule is referred to in *Watkin's on Conveyancing*, 9th edit. p. 254, n., where the doctrine is similarly laid down, and the case of *Doe* dem. *Lloyd* v. *Passingham* (*a*), is also cited. No doubt it is still competent for you to argue that the three are seised to the use of each one, and in that sense that they are *other* persons.]

Sect. 2 of 27 *Hen.* 8, c. 10 (the Statute of Uses), deals expressly with the case of several persons seised to the use of one or some of them; and Lord *Bacon* considered that even if it had not done so, that case would have fallen within sect. 1; and he further states that the converse case of one person seised to the use of several is equally within the statute. The passage in *Bacon on Uses*, p. 49, on this point is as follows:— "The second case of the joint feoffees needs no exposition; for it pursueth the penning of the general case: only this I will note, that although it had been omitted, yet the law upon the first case would have been taken as the second case provided: so that it is rather an explanation than an addition; for turn that case the other way, that one were enfeoffed to the use of himself and another, I hold the law to be, that in the former case, they shall be seised jointly; and so in the latter case, *cestui que use* shall be seised solely; for the word *other* it shall be qualified by the construction of cases as shall appear when I come to my division. But because this case of the co-feoffees to the use of one of them was a general case in the realm, they foresaw it, and expressed it precisely, and

(*a*) 6 *Barn. & Cress.* 507.

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passed over the case *è converso* which was but an especial case."

[BOVILL, C.J. How do you distinguish the case of *Doe* dem. *Hutchinson* v. *Prestwidge* (*a*)?]

There, by the express terms of the conveyance, the releasees took at common law as tenants in common, and not as joint tenants. Here, on the other hand, the common law limitation is, at all events, *primâ facie* joint; and bearing in mind that the common law always favoured joint tenancy, the Court will not control the joint limitation by importing into it words which refer merely to the limitation of the use, and have nothing to do with the common law estate. In *Blackstone*, 21st edit., vol. 2, p. 192, the reason is given why the common law favoured joint tenancy, which is material here. *Blackstone* says, "But the law is apt in its construction to favour joint tenancy rather than tenancy in common, because the divisible services issuing from land (as rent, &c.) are not divided, nor the entire services (as fealty) multiplied, by joint tenancy, as they must necessarily be upon a tenancy in common." The deed should be construed as if the question had arisen before the Statute of Uses was passed. It is submitted that though a Court of Equity might no doubt at that time have considered that the grantees were intended to take the use as tenants in common (a form of tenancy preferred in equity), a Court of Law would have construed the deed as creating at law only a joint tenancy. Such a construction

(*a*) 4 *M. & S.* 178.

would have been in accordance with the strict interpretation of the deed, and also with the leaning of the law in favour of joint tenancy.

Herschell, Q.C., in reply. The rule that a use limited to a feoffee is not in general executed by the statute is no doubt subject to the exception pointed out in *Sanders on Uses*, p. 93. "Where the whole seisin in fee is conveyed to the feoffee, and many estates in the use are carved out of such seisin, one of which estates the feoffee takes . . . the use limited to the feoffee will be executed by the statute, *for the law will not admit fractions of estate.*" But with the exception of the *dictum* in *Sammes' case*, there is not the semblance of an authority that a deed can operate under the Statute of Uses, unless some person be named in the declaration of the use who is not named in the grant. Every authority that has been cited treats this as essential to the operation of the statute, except the *dictum* in *Sammes' case;* and even that *dictum*, it is submitted, is put as something exceptional, "for the benefit of the issue." *Jenkins* v. *Young* is strongly in the appellant's favour, and fully supports the view contended for. Mr. *Booth*, in *Cases and Opinions*, vol. 2, p. 291, says:—"It may be perceived from hence that every statute use must be derived out of the seisin of some third person, so that it may be always predicated that there doth or do exist some person or persons who doth or do stand seised to the use of the said A. B. C., &c. And where there is not such standing seised by some such third person, such statute use is not good." He then refers to *Jenkins* v. *Young* (*a*),

(*a*) *Cro. Car.* 230, and *nomine Meredith* v. *Jones*, 244.

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where land was given to husband and wife *habendum* to them to the use of them and the heirs of their body, and says:—"There it was argued that the estate out of which the use should arise being no more than an estate for life, the use could not make the estate larger than the limitation. But the Judges said, they conceived there was a difference where the estate was limited to one and the use to a stranger; there the use should not be more than the estate out of which it was derived; but not when the limitation was to two, *habendum* to them, to the use of them and the heirs of their bodies. That was no limitation of the use, nor was the use to be executed by the statute; but it was a limitation of the estate to them and the heirs of their bodies; and they were in by course of the common law, and so it should be taken as a limitation to them and the heirs of their bodies, remainder to the others and the heirs of the other, that the deed might be construed according to the intent of him that made it." Mr. *Booth* further cites the opinion of Lord *Holt* in *Lord Altham* v. *Earl of Anglesey* (*a*), that "if a fine be levied to a man and his heirs, to the use of him and his heirs, in this case he shall take by the common law, and not by way of use." Even assuming the *dictum* in *Sammes' case* to be law, and to have introduced an exception not warranted by the words of the Statute of Uses, this Court will not be disposed to engraft thereon another exception.

BOVILL, C.J. In this case the claimant claimed to be inserted in the list of voters, for the south-eastern

(*a*) *Gilb. Rep.* fol. 16 and 17.

division of the county of *Lancaster*, in respect of a freehold rent-charge. He was objected to on the ground that he had not been for the required period in the actual possession of such rent-charge within the terms of sect. 26 of the 2 *Will.* 4, c. 45. That he had not been in the receipt or perception of the rent for that period is clear on the facts, and in two cases in this Court it has been held, that the actual possession required must be "actual possession" in the sense in which those words are ordinarily understood. The first of these cases is *Murray* v. *Thorniley* (*a*), where the Court, in a considered judgment, held that, in order to entitle the grantee of a rent-charge to be registered under the 26th section of the Reform Act, he must have had, either by the actual manual receipt of the rent, or of some part of it, or of something in lieu of it, a possession *in fact* of the rent-charge. The other is *Hayden* v. *The Overseers of Twerton* (*b*), where the same conclusion was come to in the case of an assignee of a rent-charge, the Court holding that case to be governed by the previous decision in *Murray* v. *Thorniley* (*a*). It is true that in *Hayden* v. *The Overseers of Twerton* (*b*), *Maule*, J. (*c*), referred to some of the grounds on which *Murray* v. *Thorniley* proceeded, stating that he was not prepared to say that he should have come to the same conclusion, but he concurred with the rest of the Court in confirming the principle on which *Murray* v. *Thorniley* (*a*) was decided. After these two decisions, it would have been useless for the respondent to contend here, that that which has been accepted as the law since 1846 (the date of the later

(*a*) 1 *Lutw.* 496 ; *S. C.* 2 *C. B.* 217.
(*b*) 1 *Lutw.* 510 ; *S. C.* 4 *C. B.* 1.
(*c*) 4 *C. B.* 6.

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of these two decisions), *viz.*, that the possession of a rent-charge, to satisfy the Reform Act, must be a possession in fact, ought not to govern the decision of this Court. In *Heelis* v. *Blain* (*a*), however, a new view was presented, the case being one in which the grant of the rent-charge did not take effect at common law, but by force of the Statute of Uses (27 *Hen.* 8, c. 10, s. 1). Throughout the argument of that case, it was assumed to be one in which the statute applied, and accordingly the whole discussion was as to the effect of the statute, and as to the nature of the "possession" in which *cestui que use* was to be "deemed" to be by virtue of it. The Court, so far from dissenting from what was decided in *Murray* v. *Thorniley* (*b*), and *Hayden* v. *The Overseers of Twerton* (*c*), entirely adopted those decisions, and proceeding wholly upon the effect of the statute of uses, held, that the claimant had, by virtue of a conveyance, operating under that statute, such an "actual possession" as is required to constitute a qualification under sect. 26 of the Reform Act. Assuming those cases to have been correctly decided, there are then two classes of cases, one where the grant of the rent-charge takes effect at common law, in which case the grantee or assignee must be in the actual possession by receipt of the rent, in order to be entitled to be registered, and the other where the grant of the rent-charge operates in favour of *cestui que use*, by virtue of the statute of uses; in which case it has been held, that *cestui que use* is at once to be deemed in actual possession within the meaning of the

(*a*) *Hopw. & Ph.* 189; *S. C.* 18 *C. B. N. S.* 90.

(*b*) 1 *Lutw.* 496; *S. C.* 2 *C. B.* 217.

(*c*) 1 *Lutw.* 510; *S. C.* 4 *C. B.* 1.

Reform Act. That brings us to the question within which of these two classes of cases the present falls, or, in other words, whether the grant of the rent-charge operates in favour of the claimant at common law, or under the statute of uses. This question is one of importance to conveyancers, and might affect titles, and we therefore thought it right to adjourn the case, to afford counsel an opportunity for looking into it more fully, and it has now been very clearly and ably argued on both sides.

Our first duty is to ascertain the true legal effect of the limitations in the deed. It is important to consider its effect at common law, with the view of ascertaining whether its operation be solely at common law, or whether there be a use which is executed by the statute. The words of the grant are, "unto the said *Robert Byron Orme*, *Enoch Lawton*, and *James Kerfoot* and their heirs, one perpetual yearly rent-charge of £9, &c." That, if it stopped there, would create a joint tenancy. But it proceeds "to hold the said rent-charge unto the said *Robert Byron Orme*, *Enoch Lawton*, and *James Kerfoot*, their heirs and assigns for ever:" and then come the words, "to the use of the said *Robert Byron Orme*, *Enoch Lawton*, and *James Kerfoot*, their heirs and assigns for ever, as tenants in common in equal shares." The question therefore is, whether the words of the *habendum* are to be divided, as I have just read them, so as to make it a grant to the three as joint tenants, and a limitation of the use to them as tenants in common, or whether the whole *habendum* is to be read together, for the purpose of ascertaining the true limitation. Now the premises of a deed are often somewhat large, while it is the office of the *habendum*

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to determine its effect; and the *habendum* is to "be construed as near the intent of the parties as may be." *Sheppard's Touchstone*, 101. In order so to construe it here, we must read the whole deed together, and, if we do so, there can be no doubt what was the intent of the parties, *viz.*, that, in accordance with the limitation at the end of the *habendum*, it should be construed as the grant of a rent-charge to the persons therein named as tenants in common. Not only is the rule laid down as I have stated it, but many instances in support of it are to be found in the books, and the premises have frequently been held to be explained by the limitations in the *habendum*. Thus, in *Coke Lit.* 183 *b*, it is said, "If a lease be made to two, *habendum* to the one for life, the remainder to the other for life, this doth alter the general intendment of the premises, and so hath it been often times resolved. And so it is, if a lease be made to two, *habendum* the one moiety to the one, and the other moiety to the other, the *habendum* doth make them tenants in common; and so one part of the deed doth explain the other, and no repugnancy between them, *et semper expressum facit cessare tacitum.*" Other instances are collected in *Viner's Abridg.* (*Ia—Na*) *Habendum*, and *Sheppard's Touchstone*, 101–106.

For determining the true effect of this deed, we have several authorities to guide us. An important one is *Jenkins* v. *Young* (*a*), which is thus stated in *Sanders on Uses*, p. 91:—"M. gave his land to E. R. and his wife, *habendum* to the said *baron and feme*, to the *use* of them and *the heirs of their two bodies*,

(*a*) *Cro. Car.* 230; and *nom. Meredith* v. *Joans*, 244.

and for want of such issue remainder to E. M. and his heirs; the question was, whether the *baron and feme* had an estate tail, or an estate for their lives only? It was argued, that the estate out of which the use should arise was an estate for their lives, and the use could not make the estate larger than the limitation of the seisin: but the judges conceived that there was a difference where an estate was limited to one and the use to a stranger, for there the use should not be more than the estate out of which it was derived, but not when the limitation was to two, *habendum* to them to the use of them and the heirs of their bodies; for this was *no limitation of the use*, nor was it executed by the statute, but it was a limitation of the *estate* to them, and the heirs of their bodies *by the course of the common law.*" That case is important in this, that the whole limitation in the *habendum* was looked at to ascertain the intention of the parties, and that words which purported to be the limitation of a use were held to be a good limitation, not of the use, but of an estate, which took effect according to the common law. If this be the correct view of that case, it is difficult to distinguish it from the present. Mr. *Booth*, in the *Collection of Cases and Opinions*, vol. 2, p. 291—294, adopts this view of it, and he says, that to create a statute use there should be a standing seised by some third person or persons to the use of some *other* person. *Sanders*, in the passage cited above, quotes the case without disapproval; and so does Mr. *Butler*, in a note to *Coke Lit.* 271 *b* (272 *a*), para. vi, (*a*), and it has been

(*a*) Note, 231.

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acted upon as law by conveyancers for a great number of years. See *Watkins on Conveyancing*, p. 245. There is, therefore, strong confirmation of the propriety of that decision. Is there then any reason in the present case why we should not adopt a similar construction? If we do not, we shall have this repugnancy, that in one part of the deed there will be a limitation to three persons, as joint tenants, and in another part to the same three persons as tenants in common. In *Bacon's Reading of the Statute of Uses* (*a*), it is said that "the whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore the statute ought to be expounded that where the party seised to the use and the *cestui que use* is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law." Suppose the question had arisen as to what was the construction of this deed, independently of the statute, could it be doubted that its object and effect were that the three persons named should take the rent-charge as tenants in common, and that it would be doing violence to its language to hold that the words at the end applied to the use merely, and not to the estate? Another case which has an important bearing is *Doe* dem. *Hutchinson* v. *Prestwidge* (*b*). There the limitation was to "*Thomas* and *Henry*, *habendum* to them, their heirs and assigns as tenants in common, and not as joint tenants, to the one proper use and behoof of them, their heirs and assigns for ever." In that case, therefore, it might

(*a*) p. 63.

(*b*) 4 *M. & S.* 178.

have been urged that there was a difference between the two parts of the *habendum*, and that the declaration of the use was such as to create a joint tenancy. Accordingly time was given to the plaintiff's counsel upon this point, and on a subsequent day, he admitted (citing the passage I have read from Lord *Bacon* (*a*)), "that *Thomas* and *Henry* took as tenants in common," "although if this had been an use executed by the statute the consequence would be that they were joint tenants" (*b*). This is a strong authority for the position that the whole *habendum* must be read together and construed reasonably. The case is cited as law by various text writers, and I do not find that it has ever been questioned, except in a passage in *Bythewood and Jarman's Conveyancing*, by *Sweet*, vol. 3, p. 224, where it is said that "this was certainly admitting the principle to a great extent, and it seems that there was ample room for argument." There is also an important passage in the 7th edition of *Sheppard's Touchstone*, p. 106, where the learned editor (Mr. *Preston*) says: "But if a grant be made to a man and his heirs, *habendum* to him and his heirs, to the use of him and his heirs for lives, the *habendum* and declaration of use are one entire limitation at the common law, and the grantee hath merely an estate for the lives," which passage is very applicable to the present case. We are, indeed, only acting on a general rule of construction, in holding that in order to ascertain the intention of the grantor, we must look at the whole of the deed, especially the *habendum*. Doing so here, I come to the conclusion that the three persons named

(*a*) p. 63. (*b*) 4 *M & S.* 178.

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in this deed take the rent-charge as tenants in common, and that each of them takes an undivided third of the rent. The same three persons take both estate and use, and in the same right, and no *other* person intervenes. I am of opinion that they take at common law, and that the case is out of the operation of the statute. Consequently the case cannot come within the operation of *Heelis* v. *Blain* (*a*), but is governed by the two previous decisions of *Murray* v. *Thorniley* (*b*), and *Hayden* v. *The Overseers of Twerton* (*c*). The decision of the Revising Barrister must therefore be reversed.

BRETT, J. This was a claim to vote in respect of a freehold rent-charge; and, in order to support it, it was necessary that the claimant should bring himself within sec. 26 of the Reform Act. He had not been in receipt of any part of the rent for the period specified in that section, and the question is whether he can be brought within the section, notwithstanding, so as to fulfil the requirement therein as to "actual possession." Now in these Revising Appeals there are, as appears to me, two canons of conduct which the Court ought to observe. First, to construe the words of the statute in their ordinary and literal sense: secondly, to adhere loyally to former decisions, unless they are clearly made out to be wrong. The first case that applies here is *Murray* v. *Thorniley* (*b*), where it was decided that by "actual possession" was meant a

(*a*) *Hopw. & Ph.* 189; *S. C.* 18 *C. B., N. S.* 90.

(*b*) 1 *Lutw.* 496; *S. C.*, 2 *C. B.* 217.

(*c*) 1 *Lutw.* 510; *S. C.*, 4 *C. B.* 1.

possession in fact as contradistinguished from a possession in law. Subsequently in *Heelis* v. *Blain* (*a*), it was held that although, where the grant of a rent-charge operates simply at common law, the grantee has prior to any receipt of the rent only a possession in law, and not an "actual possession" within the Reform Act, yet that it is otherwise where there is a use which takes effect under the statutes of uses; for then the person to whose use the rent-charge is limited is by virtue of the Statute of Uses to be "deemed" to be in "actual possession." It follows, therefore, here, if we observe the rule of conduct I have referred to, that if the grant of the rent-charge operates in favour of the claimant at common law, the case is within the principle of *Murray* v. *Thorniley* (*b*), but if by virtue of the Statute of Uses, it is within that of *Heelis* v. *Blain* (*a*); and consequently the question comes to be whether the grant simply operated at common law, or whether the use is executed by the statute.

In the first place, before determining whether the Statute of Uses applies, we must ascertain the construction of the deed. I think the authorities show that, where, as in the present case, the grant, *habendum*, and declaration of uses are to the same person or persons, and in the one part the language is general and in the other part specific, the specific statement should control the general, and the general be read as if it were specific. If that be so, then, on the true construction of this deed, it is simply a common law conveyance, and the Statute of Uses has no applica-

(*a*) *Hopw. & Ph.* 189; *S.C.*, 18 *C. B. N. S.* 90.

(*b*) 1 *Lutw.* 496; *S. C.*, 2 *C. B.* 217.

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tion. In *Jenkins* v. *Young* (*a*) the grant and *habendum* were general, but not inconsistent with the declaration of the use which was specific, and accordingly the specific statement as to the use was there held to control the general statement, and to be a limitation of the *estate* by the course of the common law. The case referred to in *Sanders on Uses*, p. 91, of an estate conveyed to A., B., C., and their heirs to hold to them, their heirs, and assigns, to the use of them for their lives and the life and lives, of the survivor, is open to the same remark. In *Doe dem. Hutchinson* v. *Prestwidge* (*b*), the *habendum* was specific, and the so-called declaration of the use general; but the *habendum* not being contradictory to the declaration of the use, the deed was read as if the use were as specific as the *habendum*. This is the result of the cases, and it is in accordance with the opinion of Mr. *Booth* (adopted by Lord *St. Leonards* (*c*)), and also with that of *Butler* and Lord *Bacon*. Applying that mode of construction here, we find the declaration of the use specific, while the *habendum* is general, and the *habendum* should therefore be read as though it were as specific as the use, which it does not contradict. So reading it, I am of opinion that this conveyance operates simply at common law. I am, indeed, disposed to go the length of Mr. *Herschell's* argument, that the Statute of Uses does not apply unless there be some person or persons in whose favour an use is declared other than the person standing seised to the use; but it is not necessary to decide that here (*d*). It is enough to say that

(*a*) *Cro. Car.* 230.
(*b*) 4 *M. & S.* 178.
(*c*) *Gilb. on Uses and Trusts*, 128.
(*d*) As to the effect of a conveyance to *A.* and his heirs to

where, as here, part is general, and part specific, and there is no inconsistency between them, the intention of the parties is to be collected from what is specific as controlling what is general. I think that under this conveyance the claimant takes at common law, and consequently that he is within the principle of *Murray* v. *Thorniley* (*a*), and not that of *Heelis* v. *Blain* (*b*), though, if he took under the Statute of Uses, I should have thought we were bound by the latter decision.

GROVE, J. I am of the same opinion. The question arises upon the meaning of the words "actual possession" in the 26th section of the Reform Act. *Primâ facie*, the meaning of those words is clear and simple, for actual possession means possession that is actual and not constructive. Moreover, that construction is strengthened by the proviso at the end of the section, which excepts cases where lands have come to any person by "descent, succession, marriage, marriage settlement, devise, or promotion to any benefice in a church, or by promotion to any office," thus showing the force the statute attaches to the words "actual

such uses as *A.* shall appoint, and in default thereof, to the use of *A.* and his heirs, see the learned controversy between Lord *St. Leonards* and Mr. *Sanders*. *Sugden on Powers*, 8th Edn. 140–144. *Sanders on Uses*, 5th Edn. 163–169. Mr. *Sanders* contended that the grantee was in by the common law, and the power void; Lord *St. Leonards*, that he was in by the statute, and the power valid. The validity of the power has been subsequently judicially recognised (as is pointed out by Lord *St. Leonards*) in *Moreton* v. *Lees*, *C. P. Lancaster*, March Ass. 1819. Case reserved and argued before Lord Chief Baron *Richards* and Mr. Baron *Wood*, at *Serjeants' Inn*; followed by *Gorman* v. *Byrne*, 8 *Ir. C. L. Rep.* 394.

(*a*) *Lutw.* 496; *S. C.*, 2 *C. B.* 217.

(*b*) *Hopw. & Ph.* 189; *S. C.*, 18 *C. B., N. S.* 90.

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possession" in the earlier part of the section. In the case of *Murray* v. *Thorniley* (*a*), this Court held that there must be a possession in fact as contradistinguished from a possession in law, and there would be no difficulty in the matter but for the decision in *Heelis* v. *Blain* (*b*). *Heelis* v. *Blain* (*b*) was a case in which the Statute of Uses applied, and there, the use being executed by the statute, the question raised and discussed was whether the possession which the Statute of Uses gave to *cestui que use* was such as to amount to an actual possession within the Reform Act, and it was held that it was. That having been so decided, the arguments in this case have been confined to the question whether or not the Statute of Uses applies here, the ground of distinction in this case being that the limitations both of the grant and of the use are to the same persons. Now, on looking at the language of the statute, as well as to the reasons for passing it, as shown in the preamble, it seems clear that the statute was only intended to apply where the persons seised to uses are seised to the uses of some persons other than themselves. The main object of the enactment was to render the conveyance of real estate a plain *bonâ fide* transaction, freed from any fictions of law, and in which the ostensible and real ownership should be coincident, though all lawyers know how this intention was frustrated by the mere repetition of the words "to the use of" in the conveyance. In terms, then, the Statute of Uses only applied where the use was limited to a person

(*a*) 1 *Lutw.* 496; *S. C.*, 2 *C. B.* 217.

(*b*) *Hopw. & Ph.* 189; *S. C.*, 18 *C. B., N. S.* 90.

other than the feoffee or grantee, but in construing it, one exception introduced was that mentioned by Lord *Coke* (*a*), where "a man maketh a feoffment in fee to one to the use of him and the heirs of his body," in which case the report says that the use is executed by the statute. Lord *Coke* considered this to have been so held for the benefit of the issue; and Lord *Bacon* (*b*), in discussing the same subject, speaks of an estate-tail as a "new estate, and not like an estate for life or years, which are but portions of the absolute fee," so that the case of an estate-tail would appear to have been regarded as exceptional. The other authorities that have been cited seem all in favour of the appellant's contention. The case put in *Sanders on Uses* (*c*), citing *Bacon on Uses*, p. 63, is very similar to the present. *Sanders* says, "If an estate be conveyed to A., B., C., and their heirs, to hold unto the said A., B., and C., their heirs and assigns, to the use of the said A., B., and C., for and during the natural lives of them, and the life and lives of the survivor and survivors of them, it should seem that this is not a statute use, but that A., B., and C. will take an estate of freehold for their lives at common law." In the present case, the grantees of the rent-charge are the same persons as the *cestuis que use*, and the question we have to decide is whether they take under the statute, or independently of it. Mr. *Mellor* has ingeniously argued that the grant is *primâ facie* a grant to three persons as joint tenants, and that joint tenancy was originally favoured by the law, and that,

(*a*) 13 Rep. 56.

(*b*) *Bacon on Uses*, 63.

(*c*) See Mr. *Booth's* opinion on this case, 2 *Cas. & Opin.* 281.

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as the use in the *habendum*, though limited to the same three persons, is limited to them as tenants in common, the character of the estate to which the use is attached is so far altered as to bring the case within the operation of the statute. The converse case of *Doe dem. Hutchinson* v. *Prestwidge* (*a*) has been already decided the other way. There the *habendum* was to two persons as "tenants in common," and though the limitation of the use (which was to the same two persons) was *primâ facie* joint, it was held that it was to be construed by the previous more specific language so as to create a tenancy in common. It has been argued, indeed, that the present case, in which the words preceding the declaration of the use are *primâ facie* words of joint limitation, is distinguishable from *Doe dem. Hutchinson* v. *Prestwidge* (*a*), because the ancient law showed a preference for joint tenancy. But, the passage in *Bacon on Uses*, p. 63, on which that decision proceeds, is equally applicable here, *viz.*, "that where the party seised to the use and the *cestui que use* is one person, he never taketh by the statute except there be a direct *impossibility* or *impertinency* for the use to take effect by the common law." Is there any such impossibility or impertinency here? I certainly think not. The specific words at the end of the limitation control the words which *primâ facie* might have been regarded as creating a joint tenancy, and enable us to construe the deed according to the intention of the parties as conveying a rent-charge to the three persons named as tenants in common. If so, the Statute of Uses has no application.

(*a*) 4 *M. & S.* 178.

As regards the decision of *Heelis* v. *Blain* (*a*) it appears to me that there may be a difficulty in holding that the possession given by the execution of the use by the statute is different from that possession in law which was held, in *Murray* v. *Thorniley* (*b*), not to be sufficient to satisfy sect. 26 of the Reform Act. It is not, however, necessary to consider that in the present case, as we are not now called upon to overrule the case of *Heelis* v. *Blain* (*a*).

DENMAN, J. I am of the same opinion. The sole question raised, or intended to be raised, is, whether this case falls within the principle of *Heelis* v. *Blain* (*a*). The Revising Barrister thought it did. We have had the opportunity of hearing the matter fully argued, and on being looked into, it is clear that *Heelis* v. *Blain* (*a*) was carefully decided, so as to leave untouched the authority of *Murray* v. *Thorniley* (*b*), and *Hayden* v. *The Overseers of Twerton* (*c*). *Erle*, C. J., in giving judgment, expressly said that "if it had been a conveyance at common law without the aid of the Statute of Uses, it is clear from the cases of *Murray* v. *Thorniley* (*b*) and *Hayden* v. *The Overseers of Twerton* (*c*), that there would have been no actual possession of the rent-charge to entitle the claimant to be registered." That decision may certainly be called a refined one in favour of the franchise. It was there held that the words "actual possession" in 2 *Will.* 4, c. 45, s. 26, were satisfied in respect of a rent-charge by the mere execution of a conveyance

(*a*) *Hopw. & Ph.* 189; *S. C.*, 18 *C. B., N. S.* 90.

(*b*) 1 *Lutw.* 496; *S. C.*, 2 *C. B.* 217.

(*c*) 1 *Lutw.* 510; *S. C.*, 4 *C.B.* 1.

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operating as regards the use under the statute, although no part of the rent was paid. Here, however, the question is whether the statute applies, and after hearing the discussion, I am clearly of opinion that it does not. Where the grant is to three persons and their heirs *habendum* to the same three, their heirs and assigns, to the use of them, their heirs and assigns for ever as tenants in common, the statute has, I think, no application; for the words of the statute are not satisfied, inasmuch as they are not persons seised to the use of *other* persons, but of themselves. It has been argued that that is not so, because, looking to the old leaning of the law in favour of joint tenancy, they are at common law joint tenants, and the use is executed in them by the statute as tenants in common. I will not say that argument is absurd, as it is as plausible as some which have prevailed; but I think the current of authorities and the reasoning founded on them is against it. The case, therefore, not being within the statute, it follows that it is not within *Heelis* v. *Blain* (*a*), but is governed by the previous decisions of *Murray* v. *Thorniley* (*b*) and *Hayden* v. *The Overseers of Twerton* (*c*).

Decision reversed.

Attorneys—For Appellant, *J. E. Fox*, for *R. Evans*, *Ashton-under-Lyne*.

For Respondent, *Rickards & Walker*, for *J. W. Mellor, Oldham*.

(*a*) *Hopw. & Ph.* 189; *S. C.*, 18 *C. B., N. S.* 90.

(*b*) 1 *Lutw.* 496; *S. C.*, 2 *C. B.* 217.

(*c*) 1 *Lutw.* 510; *S. C.*, 4 *C. B.* 1.

WEBSTER *v.* OVERSEERS OF ASHTON-UNDER-LYNE

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May 2.

Cestui que use of a rent-charge under a deed which created it, is by force of the Statute of Uses (27 *Hen.* 8, c. 10), in "actual possession thereof," within the meaning of 2 *W.* 4. c. 45, immediately on the execution of the deed, although no portion of the rent be received.

Aliter where the grant operates wholly at common law.

(*Heelis* v. *Blain. Hopw. & Ph.* 189 followed.)

Semble, The Court, though a Court of ultimate Appeal in registration cases, will review its previous decisions, when clearly wrong.

THE Case stated:—

At a Court held at *Ashton-under-Lyne* for the purpose of revising the list of voters for the *Ashton-under-Lyne* polling district, before the Barrister appointed to revise the list of voters for the south-eastern division of the county of *Lancaster*, *Thomas Webster* duly objected to the name of *Joseph Hadfield* being inserted in the list of voters for the said division of the said county of *Lancaster*.

The claim of the said *Joseph Hadfield* was as follows:—

Hadfield, Joseph	36, *Stockport Road, Ashton-under Lyne.*	One seventeenth share of rent-charge issuing from freehold land and houses.	*Cotton Street, Bentick Street,* and *Moss Street. Hugh Mason,* Owner.

The following facts were established by the evidence:—

By an indenture made and dated the 29th day of *January*, 1872, and made between *Hugh Mason* of the first part, the said *Joseph Hadfield, Robert Taylor Weild* and others of the second part, and the said *Joseph Hadfield* and *Robert Taylor Weild* of the third part, the said *Hugh Mason* being seised in fee simple in possession of certain lands and messuages in *Ashton-under-Lyne* aforesaid, granted unto the said *Joseph*

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Hadfield and *Robert Taylor Weild*, being parties thereto of the third part, and their heirs, one perpetual yearly rent-charge of £35 14*s*., to be payable clear of all deductions whatsoever (except property or income tax), by equal half-yearly payments, on the 29th day of *July* and the 29th day of *January* in each year, and the first payment to be due on the 29th day of *July* then next, and to be issuing from and out of, and charged and chargeable upon the said lands and messuages, to hold the said rent-charge unto the said *Joseph Hadfield* and *Robert Taylor Weild*, and their heirs for ever.

In the said deed is contained a declaration that the said rent-charge and the power of distress therein expressed to be granted to *Hadfield* and *Weild* is so granted, and they thereby agreed that they should hold and stand entitled to the same, "to the use of the said parties thereto of the second part, and their respective heirs and assigns, as tenants in common, and not as joint tenants."

The moiety of the said rent-charge of £35 14*s*. (less property tax) due on the 29th day of *July*, was paid on the 30th day of *July*, 1872, by the said *Hugh Mason*, to *Hadfield* and *Weild*, pursuant to the deed, and divided equally by them amongst the said persons (except *Alderson Thomas*), parties to the said deed of the second part, and *John Richards*, who stands in the stead of the said *Alderson Thomas*.

It was contended by the objector that the said *Joseph Hadfield* was not in the actual possession of the said rent-charge for six calendar months previous to the 31st day of *July*, 1872, as required by the 2 *Will.* 4, c. 45, s. 26.

It was contended by the party objected to, upon the authority of *Heelis* v. *Blain* (*a*), that the Statute of Uses (27 *Hen.* 8, c. 10) operated to give to the said party objected to, and the said other persons parties to the said indenture of the second part, the actual possession of the said rent-charge on the execution of the said indenture.

The Revising Barrister held, upon the authority of that case, that the claim was good.

If the Court should be of opinion that the decision of the Revising Barrister was wrong, the register was to be amended by erasing the name of the said *Joseph Hadfield* from the said list.

Other appeals were consolidated.

Herschell, Q.C., for the appellant (*Nov.* 19, 1872; *Jan.* 29, 1873). It is admitted that the present case cannot be satisfactorily distinguished from *Heelis* v. *Blain* (*a*); but it is submitted, on the grounds hereinafter to be stated, that *Heelis* v. *Blain* (*a*) is an erroneous decision, and should be overruled. It will be convenient, however, to consider how the law stood, apart from *Heelis* v. *Blain* (*a*), before dealing with that case. The whole question turns on the meaning to be attributed to the words "actual possession" in sect. 26 of the Reform Act. Those words mean, as is submitted, *physical* possession in the case of land, and such *physical* possession as the subject-matter is capable of in the case of a rent-charge; in other words, payment of the rent. It is proposed, in the first place, to deal with the case as if the question had arisen

(*a*) *Hopw. & Ph.* 189; *S. C.*, 18 *C. B., N. S.* 90.

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with reference to land, since the "actual possession" of land necessarily presents to the mind a more tangible and definite idea than the "actual possession" of a rent; and if *physical* possession is what the Legislature had in view with reference to land, that will go a long way to show that it had the same notion of a *physical* possession in view as regards a rent also. Now, as regards land, the true test of whether a man is or is not clothed with the actual possession is, is he the person in whom resides the power to sue for a trespass to the land. That power he clearly has if he has *physical* possession of the land, but not (as will be shown hereafter) when he has not. Convenience, as well as the natural meaning of words, point to this interpretation of "actual possession" in the Reform Act. "Actual possession" should be a thing that is patent, and easy to be ascertained. It is far more consonant with the objects of the Reform Act to ascribe this meaning to it than to hold that the words of sect. 26 are satisfied by the mere execution of a deed conferring an *estate* or *interest* in land, which after all may, and often will be a mere paper title, in other words a sham, difficult to detect, and brought into existence solely for the purpose of creating and multiplying faggot votes. The necessity for a sufficient *estate* or *interest* in the land is provided for under other sections of the Reform Act, while sect. 26 has, it is submitted, nothing to do with the question of *estates* or *interests*. The latter part of the section is not unimportant: it excepts certain cases from the operation of the section, the result in the excepted cases being to render "actual possession" unnecessary, thus showing the force which the Legislature attached

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to the words "actual possession" in the earlier part of the section. This has been already adverted to by Mr. Justice *Grove* in *Orme's* case (*a*). Assuming, then, *physical* possession of the land to be the thing which sect. 26 of the Reform Act had in view, what is the subject-matter with which the Statute of Uses deals? The Statute of Uses does not deal with *physical* possession; but what it does deal with is the creation of *estates*—its whole operation being devoted to the turning what previously to the statute was a *use* into an *estate* in the lands, in other words, to give to *cestui que use* the possession of a like *estate* in the land which he previously had in the use. With the question of *physical* possession that statute had no concern. Lord *Bacon* says of it, "The title in course of pleading is *statutum de usibus in possessionem transferendis*;" and he quotes *Kingsmill*, J., that the meaning of the statute was to make a transubstantiation of the use into a "possession." (*Bacon on Uses*, p. 32.) And at p. 45 Lord *Bacon* says, "The effect is, that *cestui que use* shall be in possession of a like *estate* as he hath in the use." The words of sect. 1 of the Statute of Uses (27 *Hen.* 8, c. 10) fully bear out this interpretation. Moreover, sect. 1 speaks *inter alia* of the "possession" of "remainders" and 'reversions," subject-matters that are incapable of being physically possessed. Where any person stands seised to uses, says the section, they that have the use (*inter alia*) "in remainder or reverter," "shall from henceforth be deemed and adjudged in *lawful* seisin, estate and *possession* of and in the same . . . reversions, remainders, &c.," to all

(*a*) *Ante*, p. 83. *S. C.*, *L. R.* 8 *C. P.* 281.

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intents, "of and in *such like estates* as they had or shall have in use, trust, or confidence, of or in the same." It will be observed, that the words used are "lawful" possession, not, as in the Reform Act, "actual" possession; and further, it is only "lawful possession" of "*such like estates*" as they had in the use. The language of sections 4 and 5 is to the same effect—indeed stronger; for sect. 5 adds the words "as if a sufficient grant, or other lawful conveyance, had been made and executed to them." It is quite true that the word "seisin" occurs in the Act as well as the word "possession." But the reason of that is, that "seisin" is a word which can only apply to a freehold interest, whereas "possession" will embrace the case of a chattel. It may be true that the Statute of Uses necessarily involves a fiction, viz., that a man not in possession is, by virtue of the statute, to be "deemed" to be in possession; but the question still remains, of what is he to be "deemed" to be in possession? The answer to that question must be, not *physical* possession of the land, but possession of such like *estate* in the land as but for the statute he would, as *cestui que use*, have had in the use.

[BOVILL, C. J. In the old forms of conveyance by lease and release, the release used always to contain the words "in his actual possession now being." That could not mean *physical* possession, for the land was generally in the possession of a tenant.]

It meant merely the possession of such an *estate* as, for the conveyancing purpose of a lease and release, it was necessary should exist. The argument on the

other side must be that it meant possession for all purposes. That, however, they cannot maintain, since that it did not mean such a possession as will entitle a man to maintain trespass will be established by the authorities. They will, therefore, be reduced to argue that it meant such a possession as would entitle a man to maintain assize. Even if that could be made out (though it is submitted that it cannot), the answer still is, that that is not an "actual possession" within the Reform Act. One reason occurs to the mind at once, viz., that assize was maintainable by a reversioner. Assize was the appropriate remedy by a freeholder disseised of his freehold. No doubt, to maintain assize the freeholder must have been seised antecedently to the disseisin, but there was no necessity that he should have had possession of the land. Thus the land might have been on lease, in possession of a tenant, by whom alone trespass would be maintainable, or ejectment in case of a dispossession.

[BRETT, J. In *Hayden* v. *The Overseers of Twerton* (*a*), which was the case of a rent-charge, *Maule*, J., as reported in 4 *Common Bench*, 8, said, "The case of *Murray*, *app.*, *Thorniley*, *resp.*, proceeded on the ground that the seisin requisite to entitle a party to be registered in respect of a rent-charge is such as would have been necessary to enable the grantee to maintain assize."]

That remark is in no way inconsistent with the appellant's argument when it is remembered what

(*a*) 1 *Lutw.* 510; *S. C.*, 4 *C. B.* 1.

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Murray v. *Thorniley* (*a*) decided. That remark only comes to this, that in *Murray* v. *Thorniley* (*a*), the party was not entitled to be registered because he could not *even* maintain assize. It does not follow that if he had been in a position to maintain assize, he would, therefore, necessarily have been entitled to be registered.

[BRETT, J. Your argument is, that equally in the case of a rent-charge and of land *physical* possession is what the Reform Act requires; and, in the case of a rent-charge, that it consists in payment of the rent. Suppose seisin of the rent-charge obtained, and the right to vote established, and that in a subsequent year the rent is unpaid?]

No doubt when a man is once actually in possession, his possession continues till he is dispossessed, or discontinues the possession; and so, in the case of a rent-charge, the mere fact of the rent being unpaid for a time might not necessarily amount to a dispossession of the rent-charge, though it would in itself be evidence of the dispossession.

Passing to the authorities which establish that the Statute of Uses does not give such a possession as will entitle *cestui que use* to maintain trespass. In *Geary* v. *Beacroft* (*b*), *Bridgman*, C.J. (*b*), said, "If a man bargain and sell land to another and his heirs by deed enrolled, without entry or claim, the freehold is in him; and he is a good tenant to the *præcipe* for a

(*a*) 1 *Lutw.* 496; *S. C.*, 2 *C. B.* 217.

(*b*) *Bridgman's Judgments*, 495. *S. C. Carter*, 66.

common recovery, as common experience proves. And so it is in the case of a devise, the devisee is in without entry or claim. *But yet neither the bargainee nor devisee could bring an action of trespass against a trespasser*, if they had not an *actual* possession *to that purpose.*" In *Gilbert on Uses*, 3rd ed. p. 184, it is said, "If a man make a feoffment in fee to A. to the use of B., B. may plead this feoffment, and show that I. S. disseised him, without laying any actual entry, for the statute executes the possession in him. . . . . *But in trespass he must show an actual entry, for this action is grounded on the disturbance of his possession, or the violation of his right by taking the actual profits, which no man could hinder him from, or disturb him in, till he shows he was in possession.*" And in a note to that edition, at p. 228, Lord *St. Leonards* says, "It has long been firmly settled, that under the bargain and sale the estate is executed and vested in the lessee for years by the statute, and is divided from the reversion, and not like to a lease for years at the common law, for in that case there is no apparent lessee until he enters. But here, by the operation of the statute, it absolutely and actually vests the estate in him, as the use, *but not to have trespass without entry and actual possession* (*Lutwich* v. *Milton* (*a*), *Green* v. *Wiseman* (*b*)." In *Williams on Real Property*, 9th ed. p. 176, it is said with reference to the contract of bargain and sale, "As by means of a contract of this kind the purchaser became entitled to the *use* of the lands, so, after the passing of the statute, he became at once entitled, on payment of his purchase-money, to the lawful seisin and posses-

(*a*) *Cro. Jac.* 604.

(*b*) *Owen*, 87; *S. C.*, *Noy*, 73.

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sion, so far at least as it was possible to consider a man in possession who, in fact, was not." In a note to that passage, Mr. *Williams* says, "Thus, he could not maintain trespass without being actually in possession, for this action is grounded on the disturbance of the actual possession, *which is evidently more than the Statute of Uses, or any other statute can give.*" And he cites the passage quoted above from *Gilbert*, 2 *Fonb. on Equity*, p. 12, and *Harrison* v. *Blackburn* (*a*). He does not mention *Heelis* v. *Blain* (*b*), though, as counsel in the case, he must have been aware of that decision (*c*), nor the anonymous case in *Cro. Eliz.* 46, on which *Heelis* v. *Blain* (*b*) proceeded, and which will be presently referred to. In *Roscoe on Actions as to Real Property*, it is said, "As the *gist* of the action of trespass is the injury to the plaintiff's possession, it is essential that he should be in actual possession of the land before he can support such action. Therefore, a person who has only a seisin in law, as the heir before entry, cannot bring trespass, *nor a bargainee before entry although the possession is transferred to him by the Statute of Uses.*" *Barker* v. *Keat* (*d*) is cited for that position as well as the authorities above referred to, and also *Com. Dig. Trespass* (B. 3). In *Heelis* v. *Blain* (*b*), these authorities were not before the Court, and the authority principally relied on for the judgment, and which no doubt conflicts with the above authorities, was the anonymous case in *Cro. Eliz.* 46. The report of that case is as follows: "Anonymous.

(*a*) 17 *C. B., N. S.* 678.

(*b*) *Hopw. & Ph.* 189; *S. C.* 18 *C. B., N. S.* 90.

(*c*) See, however, the 10th edit., published *March*, 1873, and *post*, p. 110.

(*d*) 2 *Mod.* 249.

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Nota.—That *cestui que use* at this day is immediately and actually seised and in possession of the land, so as he may have assize, or trespass before entry against any stranger who enters without title, and this by the words of the 27 *Hen.* 8, c. 10, *viz.*, 'that *cestui que use* shall stand and be seised,' &c. And this was the opinion of divers justices." It is put, therefore, as an opinion merely of divers justices, and not as a decision; and at all events it can hardly have been a decision, both in assize *and* in trespass. In *Heelis* v. *Blain* (*a*) it is said that that case derives additional authority from being cited by Chief Baron *Comyns* (See *Com. Dig. Uses* [I.]). That no doubt might be so if the Chief Baron had not also cited, under the title *Trespass* (B. 3), a directly contrary authority: "So a bargainee shall not have trespass before entry, though the possession is transferred to him by the statute (*Cart.* 66)." The authority there referred to is *Carter's* report of the judgment of *Bridgman*, C.J., in *Geary* v. *Beacroft*. It is submitted that no weight can be attached to the authority of the anonymous case in *Cro. Eliz.*, when contrasted with the various authorities and opinions of lawyers of eminence to which it has been shown to be opposed.

As to the inconveniences which will arise from adhering to the decision in *Heelis* v. *Blain* (*a*), in addition to the creation of faggot votes already mentioned, difficulties of construction will necessarily be involved as to whether or not a deed operates under the Statute of Uses. There will be the anomaly that a grant to A. to the use of B., made six months before the 31st of *July* in any year, gives the right to vote, when a

(*a*) *Hopw. & Ph.* 189; *S. C.* 18 *C. B., N. S.* 90.

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grant to A. to the use of A. does not, unless there be also before that date a payment of the rent. Again, under sect. 23 of the Reform Act and 6 *Vict.* c. 18, s. 74, the right of a mortgagee to vote depends on his being "in the *actual possession* or in receipt of the rents and profits." Now the conveyance to a mortgagee would in general take effect under the Statute of Uses. Is then the mortgagee, though not in possession, to be "deemed" by virtue of the Statute of Uses in "actual possession," or is a different construction to be put on the same words in the case of a mortgagee from that which is put on them in sect. 26 of the Reform Act? Difficulties will also arise under sect. 3 of 3 & 4 *Will.* 4, c. 27 (the Statute of Limitations) in the case of alienations by deeds operating under the Statute of Uses. If, under that statute, a purchaser is to be "deemed" in possession, though he has not been so in fact, it will not be easy to say from what period the statute commences, if indeed it ever commences, to run against such purchaser.

As to the understanding of the profession, did anyone, it may be asked, ever hear of a deed operating under the Statute of Uses being put in evidence in proof of possession?

With regard to the case of *Heelis* v. *Blain* (*a*) it is admitted that the Court should be slow to depart from what it has already decided, but in the present case there are several grounds on which such a course is, as is submitted, justifiable. First, the principle of *Heelis* v. *Blain* (*a*) cannot be limited to the particular case, but must apply to cases not foreseen at the time

(*a*) *Hopw. & Ph.*, 189; *S. C.* 18 *C. B., N. S.* 90.

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of the decision. It cannot be limited to the case of a rent-charge, but must apply equally to that of land. Secondly, the whole of the authorities were not before the Court at the time of the erroneous decision. Thirdly, the grounds of the error can be traced. Fourthly, the case is not one in which vested rights would be interfered with, if a contrary decision were now come to. The utmost effect would be to defer the right of voting in a few cases to the following year. It may be mentioned also that *Heelis* v. *Blain* (*a*) has not been allowed to pass without adverse criticism, and it is believed that the decision is not one that has received the approval of the profession. See Article in 11 Jur. N. S. 27.

There is a further point, *viz.*, that *cestui que use* can in no case have more than the feoffee or grantee from whom he derives his estate. Now, so far as regards a rent-charge, *Murray* v. *Thornley* (*b*) decides that the grantee has not before payment of the rent any possession in fact, but only a possession in law. How then can *cestui que use* be in a better position? How can he have a possession in fact, which the grantee to uses would not have. In *Bacon on Uses*, p. 47, it is said "The matter and substance of the estate of *cestui que use* is the estate of the feoffee, and more he cannot have; so as if the use were limited to *cestui que use* and his heirs, and the estate out of which it was limited was but an estate for life, *cestui que use* can have no inheritance: *so if when the statute came the heir of the feoffee had not entered after the death of his un-*

(*a*) *Hopw. and Ph.* 189; *S. C.* 18 *C. B., N. S.* 90.

(*b*) 1 *Lutw.* 496; *S. C.* 2 *C.B.* 217.

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cestor, but had only a possession in law, cestui que use *in that case should not bring assize before entry, because the heir of the feoffee could not*, so that the matter whereupon the use must work is the feoffee's estate (*a*).

On these grounds, it is submitted that *Heelis* v. *Blain* (*b*) should be overruled, and the decision of the Revising Barrister reversed. He referred also to *Co. Litt.*, 153 b, *Burton on Real Property*, 7th ed., *Co. Litt.*, 270 a (cited by *Burton*), *Anelay* v. *Lewis* (*c*), and *Mallory's Case* (*d*).

Mellor (*K. Digby* with him), for the respondents. *January* 29 and *May* 2, 1873. First, it is submitted that the precise point before the Court having been already decided on a registration appeal in *Heelis* v. *Blain* (*b*), that decision is conclusively binding on this Court, as the ultimate Court of Appeal in registration cases. The doctrine, which has been repeatedly laid down in the House of Lords, that it cannot overrule its own decisions, is equally applicable to this Court. The rule, as applicable to the House of Lords, is broadly laid down in the following judgments, *per Lord Campbell* in *The Attorney General* v. *The Dean and Canons of Windsor* (*e*), and *Beamish* v. *Beamish* (*f*), *per Lord Wensleydale* in *Mersey Docks and Harbour Board* v. *Gibbs* (*g*), and *per Lords Chelmsford* and *Colonsay* in the *Wiltes Claim of Peerage* (*h*).

(*a*) See this point more fully insisted on in the article (cited in the text) in 11 *Jur. N. S.* 27.

(*b*) 1 *Hopw. & Ph.* 189; *S. C.* 18 *C. B., N. S.* 90.

(*c*) *K. & G.* 52; *S. C.* 17 *C. B.* 333.

(*d*) 5 *Rep.* 111 *b.*

(*e*) 8 *H. L. Cas.* 391.

(*f*) 9 *H. L. Cas.* 338.

(*g*) *L. R.* 1 *H. L.* 125.

(*h*) *L. R.* 4 *H. L.* 147, 169.

[BOVILL, C.J. Suppose the Court were to decide a case wrongly, from overlooking an Act of Parliament; would that decision be binding on them when, in a subsequent case, the Act of Parliament was brought to their notice?

BRETT, J. No doubt it must be clearly made out that the former decision was wrong, but where that has been done we have, as in *Rolleston* v. *Cope* (*a*), overruled our previous decision.]

There the circumstances, it is submitted, were different. The decisions which preceded *Rolleston* v. *Cope* (*a*) conflicted one with another. *Rolleston* v. *Cope* (*a*) was, in point of fact, decided on the authority of the last of the conflicting decisions, and the judgment of *Bovill*, C.J., seems to proceed expressly on that ground. The other members of the Court discuss the earlier cases with the view of showing that, as regards their *ratio decidendi*, they are distinguishable. Moreover, in *Rolleston* v. *Cope* (*a*), the question whether the Court had the *power* to overrule its previous decisions does not seem to have been raised.

[BOVILL, C.J. Though not raised at the bar, that point was discussed on the bench.]

The 6 *Vict.* c. 18, s. 66, enacts, "That every judgment or decision of the said Court shall be final and conclusive in the case upon the point of law adjudicated upon, and shall be binding upon every com-

(*a*) 1 *Hopw. & Colt.* 488; *S. C.*, *L. R.* 6 *C. P.* 292.

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mittee of the House of Commons appointed for the trial of any petition complaining of an undue election, &c."

[BRETT, J. Final and conclusive *in the case*. How does that assist you here?]

It affords an argument *ab inconvenienti*. The election Judge, who is substituted in place of the election committee, is conclusively bound by the decision of this Court as to each particular set of votes on which this Court adjudicates. If, therefore, two sets of votes come before the election Judge, on which this Court has pronounced conflicting decisions, he will be bound in disposing of them to rule the same point of law first in one way and then in another.

[He referred also to *Roberts* v. *Percival* (*a*).]

But, secondly, if the decision in *Heelis* v. *Blain* (*b*) be not absolutely binding on this Court, it will, at all events, not be overruled, unless it be conclusively made out that it was wrong. A strong reason for supporting it is to be found in the length of time that has elapsed since the decision was pronounced. There is also the further circumstance adverted to by *Denman*, J., that the Legislature (who must be assumed to have been cognizant of the decision) have not, when passing a Representation Act, thought fit to alter the law in consequence of it. If the creation of faggot

(*a*) *Hopw. & Ph.* 121; *S. C.* 18 *C. B., N. S.* 36.

(*b*) *Hopw. & Ph.* 189; *S. C.* 18 *C. B., N. S.* 90.

votes was a real consequence of *Heelis* v. *Blain* (*a*), it would, no doubt, have received the attention of the Legislature. It is submitted, notwithstanding the attacks that have been made on *Heelis* v. *Blain* (*a*), that that decision was perfectly sound, and certainly that it ought not now to be overruled. It has been argued on the other side that sect. 26 of the Reform Act contemplated *physical* possession equally in the case of a rent-charge as in the case of land; and that in the case of a rent-charge, that must mean payment of the rent. But in the case of an incorporeal thing like a rent-charge, there can be no such thing as *physical* possession. The only possession of which such a thing is susceptible is necessarily constructive. The cases of *Murray* v. *Thorniley* (*b*) and *Hayden* v. *The Overseers of Twerton* (*c*) establish that it is by no means essential to the acquisition of the franchise, in respect of a rent-charge created by a common law conveyance, that there should have been an actual payment of the rent. A half-penny or anything else handed over in the name of the rent, whether or not any rent be due, is sufficient within *Murray* v. *Thorniley* (*b*) and *Hayden* v. *The Overseers of Twerton* (*c*) to vest in the grantee the actual seisin and possession of the rent; and would under the old law entitle the grantee, if his possession were violated, at once to maintain assize. See *Gilbert on Rents*, p. 108. To read *Murray* v. *Thorniley* (*b*) as deciding that "actual possession" meant in the case of a rent-charge *physical* possession is entirely to misread that decision. On

(*a*) *Hopw. & Ph.* 189; *S. C.* 18 *C. B., N. S.* 90.

(*b*) 1 *Lutw.* 496; *S. C.* 2 *C. B.* 217.

(*c*) 1 *Lutw.* 510; *S. C.* 4 *C. B.* 1.

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the contrary, the decision adopted in *Murray* v. *Thorniley* (*a*), and followed in *Hayden* v. *The Overseers of Twerton* (*b*) (turning on the nature of a seisin in fact as contradistinguished from a seisin in law) is to the full as technical and constructive as the decision arrived at in *Heelis* v. *Blain* (*c*). The difficulty which exists with reference to questions of possession in the case of a rent-charge is one that is inherent in its incorporeal character. It is not necessary to contend on the present occasion that in the case of land the Statute of Uses vests in *cestui que use* such a possession as would entitle him to maintain trespass. On this point it may be admitted that the authorities are conflicting, and that the point has always been considered doubtful. Thus in *Sanders on Uses*, 5th edit., vol. 2, p. 56, it is said: "It seems doubtful whether the bargainee can maintain an action of *trespass* before an actual entry." On this point the anonymous case in *Cro. Eliz.* 46, and *Com. Dig. Tit. Uses* (I.) are important authorities. But the argument as to trespass has at all events no application to a rent-charge, since in respect of a rent-charge no such action as trespass is maintainable. What then is the effect of the Statute of Uses? One of its most ordinary effects as regards land was to dispense with the necessity for any formal entry on the land for the purpose of vesting the actual seisin and possession of the estate. Thus at common law lessee for years before an actual entry on the land had only an *interesse termini* and no vested estate. But under the Statute of Uses a bargainee for years

(*a*) 1 *Lutw.* 496; *S. C.* 2 *C. B.* 217.

(*b*) 1 *Lutw.* 510; *S. C.* 4 *C. B.* 1.

(*c*) *Hopw. & Ph.* 189; *S. C.* 18 *C. B. N. S.* 90.

had no necessity for any entry. By the mere operation of the statute his estate was vested in actual possession, and the bargainor's estate was turned into a reversion, which lay in grant, and would therefore pass without livery of seisin: *Lutwich* v. *Milton* (*a*), *Barker* v. *Keat* (*b*), 2 *Blackstone's Commentaries*, 339. Similarly in the case of a freehold estate in land the actual seisin and possession of the estate passed by force of the statute to *cestui que use* without actual entry. In *Cruise's Digest*, *Tit.* xi, *Use*, c. 3, s. 35, it is said, that when the circumstances necessary to the execution of a use concur "the possession and legal estate of the lands, out of which the use was created, is immediately taken from the feoffee to uses, and transferred by the mere force of the statute to the *cestui que use*. And the seisin and possession thus transferred is not a seisin and possession in law only, but an *actual seisin and possession in fact*: not a mere title to enter upon land, but an actual estate." So as regards a freehold rent-charge. The handing over of something as part, or in name, of the rent (for the purpose of giving seisin thereof) was necessary at common law to place the grantee in a position to maintain assize. Though not exactly an attornment (as to which see *Com. Dig. Tit. Attornment*, B.), it was an act of a character analogous to an attornment; and the effect of the Statute of Uses with regard to it would, it is submitted, be the same as if it were strictly an attornment. Now the effect of the Statute of Uses, as regards attornment, was to vest the actual seisin of the rent-charge in *cestui que use* without any attorn-

(*a*) *Cro. Jac.* 604.

(*b*) 1 *Mod.* 263; 2 *Mod.* 249.

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ment being necessary. Thus, in *Com. Dig. Tit. Attornment*, L., it is said, "an attornment is not necessary where the estate passes by way of use, for the statute 27 *Hen.* 8, c. 10, executes the possession to the use:" see also *per Parke*, B., in *Vigers* v. *Dean of St. Paul's* (*a*). If the analogy of attornment holds, as it is submitted it does, the case is at once brought within the doctrine of *Murray* v. *Thorniley* and *Hayden* v. *The Overseers of Twerton*, since there is then by virtue of the Statute of Uses such a possession in *cestui que use* as would enable him to maintain assize, which those cases establish as the true test, in the case of a rent-charge, of possession within sect. 26 of the Reform Act. The *anonymous* case in *Cro. Eliz.* 46, is an uncontradicted authority as to the right of *cestui que use* to maintain assize. The case of *Cooke* v. *Herle* (*b*) may here be referred to as a case in which the rent-charge was held to be executed by the Statute of Uses, and *cestui que use* by the effect of the statute to have the power to distrain.

It has been suggested on the other side that difficulties may arise under sec. 3 of the Statute of Limitations (3 & 4 *Will.* 4, c. 27) by adhering to *Heelis* v. *Blain* (*c*). That suggestion, however, is without foundation. The possession referred to in sec. 3 of the Statute of Limitations, is not, it is submitted, that kind of possession with which sec. 26 of the Reform Act as interpreted by *Murray* v. *Thorniley* (*d*), and *Heelis* v. *Blain* (*c*) deals. A penny paid in the name of the rent

(*a*) 14 *Q. B.* 928; and see *Co. Litt.* 309 *b*; *Sir Moyle Finch's Case*, 6 *Rep.* 68.

(*b*) 2 *Mod.* 138.

(*c*) *Hopw. & Ph.* 189; *S. C.*, 18 *C. B. N. S.* 90.

(*d*) 1 *Lutw.* 496; *S. C.*, 2 *C. B.* 217.

before any rent was due would not, it is conceived, give possession of the rent within sec. 3 of the Statute of Limitations. Sec. 10 of the Statute of Limitations illustrates the difference between the two Acts by enacting "That no person shall be deemed to have been in *possession* of land merely by reason of having made an entry thereon." The effect of an entry is pointed out in *Cole on Ejectment*, p. 67. The Statute of Limitations would seem to have contemplated some more complete possession than that with which the Statute of Uses deals, and to which it annexes the use, and something more than the possession which would entitle a man to maintain assize.

He referred also to *Co. Litt.* 9 a, and *Gale on Easements*, 3rd ed. p. 23.

Herschell, Q.C., in reply (*May* 2, 1873)., insisted, for the reasons already given, that "actual possession" in sec. 26 of the Reform Act meant *physical* possession equally in the case of a rent-charge and of land. *Murray* v. *Thorniley* (*a*) did not establish the right to maintain assize as the test of "actual possession," but only that there was no "actual possession" where that action would not have been maintainable. As to *Cook* v. *Herle* (*b*), a seisin in law was sufficient to ground a distress (*c*), whereas, for the maintenance of assize it was absolutely essential that a seisin *in fact* should have existed antecedently to the disseisin in respect of which the assize lay. That the right to bring assize could not be the test of "actual possession" was shown

(*a*) 1 *Lutw.* 496; *S. C.*, 2 *C. B.* 217.

(*b*) 2 *Mod.* 138.

(*c*) See *Com. Dig. Seisin, E.*, 4 *Co.* 9 *a.*

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by the consideration that assize lay until the writ was barred by time, whereas it could hardly be contended that a man who had for years been out of the receipt of a rent-charge could nevertheless be regarded as in the "actual possession" of it.

[GROVE, J. At an earlier period of the argument it was said that *Heelis* v. *Blain* (*a*) was not quoted by Mr. *Williams* in his work on Real Property. In the 10th edition (*b*), at p. 178, I observe that he says, "See, however, *Anon. Cro. Eliz.* 46: *Com. Dig. Tit. Uses*, (I.); *Heelis* v. *Blain*, 18 *C. B. N. S.* 90."]

BOVILL, C.J. In this case the Revising Barrister has allowed the claim of *Joseph Hadfield* to the franchise in respect of a rent-charge, although *Hadfield* had not had for six months previous to the 31st day of *July* the actual perception of the rent-charge. The respondents contended that he was nevertheless entitled to the franchise in respect of it, because, as they contended, as soon as the grant was made he was by force of the Statute of Uses (27 *Hen.* 8. c. 10) in "actual possession" within the meaning of sect. 26 of the Reform Act. That section enacts, "That no person shall be so registered in any year in respect of his estate, or interest in any lands or tenements as a freeholder, etc., unless he shall have been in the *actual possession* thereof, or in receipt of the rents and profits thereof for his own use for six calendar months at least next previous to the last day of *July* in such

(*a*) *Hopw. & Ph.* 189; *S. C.* 18 *C. B., N. S.* 90.

(*b*) Published *March*, 1873.

year." This section therefore applies both to lands and tenements, and a rent-charge is a tenement within its meaning. In the cases of *Murray* v. *Thorniley* (*a*) and *Hayden* v. *The Overseers of Twerton* (*b*), in both of which cases the grant on which the question arose operated wholly at the common law, it was held that in order to satisfy sect. 26 of the Reform Act, the grantee must have had for the required period the actual perception of the rent-charge. So far the matter was clear of difficulty. But in the case of *Heelis* v. *Blain* (*c*), it was decided on the construction of the Statute of Uses, that where the use was executed by that statute, there was no necessity that *cestui que use* should have had the actual perception of the rent-charge, but that, by force of the statute, as soon as the conveyance was executed, *cestui que use* was in "actual possession." In the able argument of Mr. *Herschell* it has been pressed upon us that that decision was not warranted by law, and certainly, to my mind, if the matter were now *res integra*, strong grounds in support of that conclusion have been adduced. Upon the first view of the question, indeed, it occurs to the mind that "actual possession" of the thing granted points to something beyond the mere grant itself. But *Heelis* v. *Blain* (*c*) has decided that where the use is executed by the statute, actual perception of the rent-charge is not necessary, and the question is whether we are to abide by that decision or to lay down a different rule.

On the part of the respondents, it was contended

(*a*) 1 *Lutw.* 496; *S. C.*, 2 *C. B.* 217.

(*b*) 1 *Lutw.* 510; *S. C.*, 4 *C. B.* 1.

(*c*) *Hopw. & Ph.* 189; *S. C.*, 18 *C. B. N. S.*, 90.

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that the Court being in registration appeals the court of ultimate appeal, its decisions are final, and ought not to be overruled. We must remember, however, the mode in which Acts of Parliament are passed. From the numerous alterations which are introduced during the passage of a bill through the Houses of Parliament, and especially when a new jurisdiction is created, the Court is at times placed in a position of very great difficulty, and it is almost impossible to preserve a strict uniformity of decision. In *Rolleston* v. *Cope* (*a*), this Court was compelled to make its election between authorities which conflicted with one another.

I should be sorry to lay down any rule which might preclude this Court, sitting in registration appeals, even where the point raised is precisely the same that has been already decided, and especially where some earlier authority has been overlooked or a principle of law clearly mistaken, from re-considering the subject of a former decision. I do not consider that our former decisions are binding on us absolutely, in the way in which the House of Lords considers itself bound; nor do I think the cases are parallel. The decisions of the House of Lords, as the highest tribunal and ultimate court of appeal, are authoritative declarations of the law, not merely by lawyers, but by the whole House of Peers; and it is only in modern times that they are pronounced by a select number of the members. But that principle has never been applied to the superior courts of common law when exercising, as here, a peculiar jurisdiction. Such a jurisdiction is exercised by

(*a*) *Hopw. & Colt.* 488; *S. C.*, *L. R.* 6 *C. P.* 292.

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the Court of Queen's Bench in appeals from Quarter Sessions, by the Court of Exchequer in cases affecting the revenue, and by this Court in registration cases and cases arising under the Railway and Canal Traffic Act. On the creation of a new jurisdiction, time must necessarily elapse before the law can be definitively settled, and occasional mistakes must occur. And I think it would be attended with great inconvenience and mischief if the Courts, when exercising these peculiar jurisdictions, were to hold that a decision, though clearly erroneous, must nevertheless bind them conclusively till the Legislature intervened. I am therefore of opinion that we are not so bound here, but that we are fully at liberty to re-consider any former decision that has been pronounced upon these Acts of Parliament.

The question then is, are we to follow the authority of *Heelis* v. *Blain* (*a*), in the present case. I think we should, unless it be clearly made out that it cannot be supported. Mr. *Herschell* undertook to satisfy us on this point, and that great inconvenience would result if we upheld it. Now if the question were one of general application affecting titles and the practice of conveyancers, I should have thought we ought to approach it with the greatest caution. That, however is not the case. We have only to ascertain here what the effect of the Statute of Uses is as applied to the 2 *Will.* 4, c. 45, s. 26. *Heelis* v. *Blain* (*a*) was a decision upon those two Acts, and simply as they affect the franchise and no further. The question involved is whether, when a grant of a rent-charge operates in favour of

(*a*) *Hopw. & Ph.* 189 ; *S. C.*, 18 *C. B. N. S.* 90.

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cestui que use under the statute, *cestui que use* is in actual possession from the time of the grant. *Heelis* v. *Blain* (*a*) was a decision that he was, and the Court, in giving judgment, relied on several authorities in support of that view: *Anonymous* (*b*), *Com. Dig. Tit. Uses*, (I.), *Co. Litt.* 315 a, and *Butler's* note, and *Burton's Compendium of the Law of Real Property*, § 1116. Unfortunately, there are several other authorities, which Mr. *Herschell* has now brought before us, but which were not before the Court upon that occasion, and it would certainly have been more satisfactory if those authorities had been fully considered. For myself, I own that Mr. *Herschell's* argument has shaken my confidence in the decision of *Heelis* v. *Blain* (*a*); but I think that to raise a doubt in our minds as to the correctness of that decision is not enough, but that Mr. *Herschell* was bound to satisfy us that it is clearly wrong. I am of opinion that his argument has not gone that length.

There are many authorities in the books which show that for a great length of time the Statute of Uses has been regarded as giving a possession, which, for some purposes, at all events, is treated as an "actual possession." The most ordinary instance of this was the effect of the bargain and sale for a year in the conveyance by lease and release. The land was frequently at a distance, and in the possession of a tenant, and it was doubted at first whether the bargain and sale had the effect of transferring the possession so as to dispense with an actual entry. See

(*a*) *Hopw. & Ph.* 189; *S. C.*, 18 *C. B. N. S.* 90.

(*b*) *Cro. Eliz.* 46.

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Barker v. *Keate* (*a*), where it is stated to have been *Noy's* opinion (and *Noy* has always been considered a great authority) that this form of conveyance could never be maintained without the *actual entry* of the lessee. In *Preston on Conveyancing*, 2nd ed., vol. ii., p. 219, treating of "a lease and release," it is said—"By the common law, and till the statute for the amendment of the law (*b*), attornment of the particular tenant was essential to the validity of the grant, and the tenant might in many cases withhold attornment, or the grantor or grantee might die before attornment had taken place. Each of these events would defeat the grant; for unless attornment was obtained in the life-time of the grantor, and also of the grantee, the grant became inoperative and failed of effect. Besides, there was a notoriety attending livery or attornment which must have been distressing in transactions of delicacy which required secrecy; and, in giving the history of this assurance, it is said this conveyance," *i.e.*, the conveyance by lease and release, "was at first only purposely contrived by Serjeant *Francis Moore*, at the request of Lord *Norris* to the end that some of his kindred or near relations should not take notice by any search of public records what conveyance or settlement he should make of his estate. In *Barker* v. *Keate* (*a*) also, it is stated by Lord C. J. *North*, that Mr. Serjt. *Moore* was the inventor of this mode of assurance. The inconveniences thus experienced naturally led men of extensive practice to contrive some mode of conveyance by which the estate might be transferred immediately and without any interval from one man

(*a*) 2 *Mod.* 252.

(*b*) 4 *Anne*, *c.* 16, *s.* 9.

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to another, although both parties were at a distance from the lands, and without even the necessity of their meeting for the purpose, or their giving any written authority to deliver or receive the seisin." See also Mr. *Bythewood's* note to *Noy's Maxims*, 9th ed. p. 289. At p. 228, Mr. *Preston* says further, "The bargain and sale passed an use, and the use was executed by the statute of 27 *Hen.* 8 for transferring uses into possessions, and the use became a *term*, in other words, *an actual estate*; and the bargainee was without entry precisely in the same circumstances as a lessee at the common law was after entry or attornment, with the difference only that a bargainee could not maintain trespass for any injury to the possession until he had actually entered; but this was a circumstance which, though it affected the remedy for injuries to the possession, was not of any importance in the consideration of the principles on which the doctrine of releases, in enlargement of a vested estate for years, depended" (*a*). In *Barker* v. *Keate* (*b*), the question raised by a special verdict was, "whether there was a good tenant to the *præcipe* or not, which was made by a bargain and sale, but no money paid, nor any rent reserved but that of a peppercorn, to be paid at the end of six months upon demand, and the release and grant of the reversion

(*a*) It should be remarked that, at p. 232, Mr. *Preston* further says, "While the profession read *Littleton* or Lord *Coke's* comments in a literal sense, as requiring that there should be an estate accompanied with *actual possession*, and not merely a *vested estate* giving a present right or future enjoyment, they were perverting the *use*, and the object of this species of assurance; and were reasoning on principles which were inapplicable."

(*b*) 1 *Mod.* 263; 2 *Mod.* 249.

thereupon was only 'for divers good considerations.' The question was, If this lease, upon which no rent was reserved but that of a peppercorn, be executed by the Statute (27 *Hen.* 8, c. 10,) of Uses, or not. If it be, then there is no need of the entry of the lessee, for the statute will put him in actual possession, and then the inheritance, by the release or grant of the reversion, will pass. But if this lease be not within the statute, because no use can be raised for want of a consideration, then it must be a conveyance at the common law, and so the lessee ought to make an actual entry, as was always usual before the making of the statute." And "judgment was given by the whole Court, that the word 'grant' in the lease will make the land pass by way of use: that the reservation of a peppercorn was a good consideration to raise an use to support a common recovery: that this lease being within the statute of uses, there was no need of an *actual entry* to make the lessee capable of the release; for, by virtue of the statute he shall be adjudged to be in *actual possession*, and so a good tenant to the *præcipe*." In all the ordinary forms of conveyance by lease and release, so long as that form of conveyance was in use, it was the practice to describe the lessee under the bargain and sale for a year as in actual possession by force of the bargain and sale. In *Anonymous*, *Cro. Eliz.* 46, it is laid down that *cestui que use*, "at this day" (28 *Eliz.*) "is actually seised and in possession of the land, so as he may have assize," though *Lord Bridgman*, in *Geary* v. *Beacroft* (*a*), lays it down, that he cannot maintain trespass. If we

(*a*) *Lord Bridgman's Judgments*. 496; *Carter*, 66.

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were to go through the authorities, with the object of reconciling them and laying down a rule consistent with all of them, we should be embarking in a hopeless task. For some purposes the Statute of Uses has, for more than two centuries, been held to confer an actual possession, and for others not. The question is, whether we can say, on a review of the authorities, that *Heelis* v. *Blain* (*a*) was clearly wrong. If the matter were *res integra*, I should be disposed to adhere to the plain words of the enactment in sect. 26 of the Reform Act, and to hold that "actual possession" meant what the words import. The words, however, are "lands and tenements," and no doubt there is a difficulty in applying the words "actual possession" to the case of an incorporeal hereditament, such as a rent-charge, which is held to be included under the word "tenement." It is said that, by upholding *Heelis* v. *Blain* (*a*), we may afford the means of evading the Act, but, even if that be so, it may, with equal ease, be evaded by the payment of a merely nominal sum, and there is hardly any Act of Parliament which ingenious minds may not find some means of evading. However that may be, the decision of *Heelis* v. *Blain* (*a*) has now been acted on for years, and has regulated the franchise since 1864, and the Legislature, when passing a Representation Act, has not thought fit to enact any amendment of the law as in *Heelis* v. *Blain* (*a*) it is laid down.

I think, upon the whole, that no sufficient grounds have been adduced to make it imperative on us to overrule the case of *Heelis* v. *Blain* (*a*), and that Mr.

(*a*) *Hopw. & Ph.* 189; *S. C.*, 18 *C. B. N. S.* 90.

Herschell has not satisfied us that it is so clearly wrong that we ought to overrule it. The decision of the Revising Barrister must therefore be affirmed.

BRETT, J. The question is, whether the claimant has been, within sect. 26 of the Reform Act, in "actual possession" of this rent-charge for the six months prior to the 31st of *July*, as that section prescribes. It is said that he has, because, on the authority of *Heelis* v. *Blain* (*a*), he has been in "actual possession" by force of the Statute of Uses from the day when the grant was made; and, unless we are prepared to overrule *Heelis* v. *Blain* (*a*), this contention is correct. On the part of the appellant, it has been argued that *Heelis* v. *Blain* (*a*) ought to be overruled. On the part of the respondents, that we have no power to do so; firstly, because this Court is a court of ultimate appeal in registration cases; and, secondly, upon the words of sect. 66 of 6 *Vict.* c. 18, which enacts that every judgment or decision of the Court "shall be final and conclusive in the case, upon the point of law adjudicated upon, and shall be binding upon every Committee of the House of Commons appointed for the trial of any petition complaining of an undue election or return of any member to serve in Parliament." Cases have been cited, as showing that the House of Lords, when acting judicially, cannot overrule its former decisions. I doubt whether that be the meaning of what is there stated; and whether, if it were clearly made out that a former decision was erroneous, it would not be competent for the House of Lords to re-consider the mat-

(*a*) *Hope. & Ph.* 189; *S. C.*, 18 *C. B. N. S.* 90.

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ter in a subsequent case. Be that as it may, I think that this Court, exercising a jurisdiction conferred by a particular Act of Parliament, is bound to administer that law which it is convinced is correct. I abide by what I said in *Orme's* Case (*a*), that the Court is bound to adhere loyally to its former decisions, unless clearly satisfied that they are wrong; but that if we are so satisfied, we ought not to follow them. The Court has acted on that principle upon more than one occasion. As to the words of sect. 66, on which reliance was placed, by the very terms of that section the judgment is only to be final *in the case* in which it is pronounced.

The question then to be dealt with is, are we to overrule the case of *Heelis* v. *Blain* (*b*). The decision there was that the phrase "actual possession" in sect. 26 of the Reform Act must have the same meaning ascribed to it as the word "possession" in the Statute of Uses. The authorities to which my lord has referred show by a continuous and general interpretation of conveyancers and courts that the possession spoken of in the Statute of Uses is to be deemed to be an actual possession; and that that is so not only in the case of a rent-charge, but in the case of land. If once there be actual possession, it must continue until it be got rid of. In the case of land, when there is a possession on which trespass is maintainable, it can be visibly seen when it is got rid of; and so in the case of the *quasi* actual possession conferred by the Statute of Uses, there would I think be no great difficulty in

(*a*) *Ante*, p. 60; *S. C.*, *L. R.* 8 *C. P.* 299.

(*b*) *Hopw. & Ph.* 189; *S. C.*, 13 *C. B. N. S.* 90.

showing that it had been got rid of, by some visible act. If during the six months prior to the 31st *July* the possession should have been thus got rid of, then of course it has not continued for the required period, and there is consequently no vote. No doubt, in the case of a rent-charge there is more difficulty in seeing when the possession is got rid of. If the rent were assigned within the six months, the right to the possession would be visibly gone. If the rent became due during the six months, and was not paid, it may be (though whether it be so or not I am not now prepared to say) that the mere abstaining to receive the rent might be considered evidence of a ceasing to hold possession. But it seems to me that the actual possession of the rent-charge being once in the grantee by force of the Statute of Uses, it must from its nature be taken to remain in him until some rent be due and be not received, or until he has done some act to divest himself of it. That is, I think, substantially the effect of *Heelis* v. *Blain* (*a*), and it is sufficient to say that that decision has not been shown to be clearly wrong. So far from saying that, however, I must own that, paying the deference which is due to the great learning and ability of the judges who decided it, I am wholly unprepared to make any such assertion. I admit that the decision is anomalous with regard to the Franchise Acts; but the anomaly arises from the construction which has for so many years been put by conveyancers and courts upon the Statute of Uses, and must remain until the Legislature intervenes. I therefore think the decision of the Revising Barrister should be affirmed.

(*a*) *Hopw. & Ph.* 189; *S. C.*, 18 *C. B. N. S.* 90.

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GROVE, J. I am of the same opinion. I feel bound, however, candidly to admit that if this matter were before us for the first time I should have been inclined, reading sect. 18 and sect. 26 of the Reform Act together, to hold that the words of sect. 26 meant that there should be something more than a mere secret conveyance, which might be handed back the moment the object had been accomplished. It is true that as regards things that lie in grant a similar evasion might be practised, even though an actual payment of rent had been made. Still, looking at the language employed, apart from the case of *Heelis* v. *Blain* (*a*), it appears to me to point to something that is capable of demonstration, and which would afford some information to the public as to the fact of possession. The case of *Murray* v. *Thorniley* (*b*) turned upon the meaning of the words "actual possession," and *Tindal*, C.J., in delivering the judgment of the Court, said, "The question undoubtedly turns upon the meaning of the words, 'actual possession,' and we think those words mean a possession in fact, as contradistinguished from a possession in law, and that as the possession in fact of a rent-charge must be the actual manual receipt of the rent itself, or some part of it, or of something in lieu of it, so there could be no such possession in fact in this case, when the first payment of the rent did not become due until after the expiration of the month of *July*, and where nothing whatever took place but the mere execution of the deed." And further on he says: "The actual possession of rent

(*a*) *Hopw. & Ph.* 189; *S. C.*, 18 *C. B. N. S.* 90.

(*b*) 1 *Lutw.* 496; *S. C.*, 2 *C. B.* 217.

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being therefore a *well-known* legal phrase or expression, the Legislature cannot be taken to have used it in any other than such well-known sense, that is, as contra-distinguished from such possession in law, or right to the rent-charge, as the bare delivery of the deed or grant would confer." If the cases that have been brought before us as to the phrase "actual possession" had been before *Tindal*, C.J., he would hardly have used the term "well-known," as applied to it. The cases show that the term "actual possession" has been applied, for some purposes at all events, to a possession which certainly is not a physical possession. The difficulty has arisen from the subtleties practised by conveyancers, for the words of the Statute of Uses seem in themselves to be clear and intelligible. All that was intended by the statute was to make the ownership of real property a matter of notoriety, and to prevent an apparent owner being put forward while the real beneficial ownership was kept secret. But we know how this object was defeated by the mere introduction of a few words into the conveyance; and also how the statute was the means of enabling a possession to be given, as previously to the statute it could not, by mere parchment. On referring to the cases we get involved in a labyrinth of phrases, and Mr. *Mellor*, on being appealed to, supplied us with a new expression, *viz.*, "constructive actual possession."

As regards our decision here, the ground that influences my judgment and induces me to concur in upholding *Heelis* v. *Blain* (*a*) is, that on looking at the

(*a*) *Hopw. & Ph.* 189; *S. C.*, 18 *C. B. N. S.* 90.

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authorities we find, that the words "actual possession" have been used in a sense which will sustain the authority of that case, and though my own opinion would have been, if the matter were new, that the words of the Reform Act must mean something different, I am not now prepared to go the length of overruling it. I agree that this Court ought not to overrule its own previous decision, unless it be clearly wrong, especially when it has been acted on for several years, and when as here the Legislature, in dealing with the subject of representation, has recognised the authority of that decision by leaving the law unaltered.

With regard to the words of 6 *Vict.* c. 18, s. 66, they do not make the decision final and conclusive to all intents and purposes, but only in the case adjudicated upon. Still, inasmuch as the section says that it is to be binding on every Committee, an inconvenience would arise if two inconsistent decisions came before the same tribunal.

Upon the whole, I think that an overwhelming case ought to be made out to induce us to do what Mr. *Herschell* asks, and looking to the language employed in the older cases I am not prepared to do it.

DENMAN, J. I am of the same opinion. The question is, what is the meaning of the words "actual possession" in sect. 26 of the Reform Act, when applied to a rent-charge created by a conveyance to a use which is executed by the statute. *Primâ facie*, no doubt, "actual possession" means possession in fact, but there are many cases in which what is called *actual* is really *constructive*. A recent case is *Glad-*

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stone v. *Padwick* (*a*), where a seizure by the sheriff, executed at a mansion house, was held on the facts to be an "*actual* seizure" within 19 & 20 *Vict.* c. 97, s. 1, of goods at a farm-house about a mile distant. When the subject-matter is incorporeal, as is the case of a rent-charge, "actual possession" can hardly mean actual manual possession. We then come to the case of *Heelis* v. *Blain* (*b*), a decision directly in point on this very section; and subsequently to that decision there has been legislation on the subject of the franchise; yet the Legislature, though it must be presumed to have been aware of that decision, has not thought fit to alter the law in consequence of it. That being so, the decision ought I think to be binding on us, unless it be conclusively established that it was wrong. Notwithstanding the very able argument of Mr. *Herschell* I am by no means clear that, if the question had come before us now for the first time, I should have differed from the decision arrived at in *Heelis* v. *Blain* (*b*), and certainly before doing so I should have desired to take time to look into the authorities. Under these circumstances I do not think that this is a case in which the Court ought to overrule its former decision.

Decision affirmed.

Attorneys—For Appellant, *J. E. Fox*, for *R. Evans*, *Ashton-under-Lyne.*
For Respondents, *Rickards & Walker*, for *J. W. Mellor, Oldham.*

(*a*) *L. R.* 6 *Exch.* 203.

(*b*) *Hopw. & Ph.* 189; *S. C.*, 18 *C. B. N. S.* 90.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

UNDER THE STAT. 6 VICT. c. 18,

IN

MICHAELMAS TERM, 1873,

IN THE

THIRTY-SEVENTH YEAR OF QUEEN VICTORIA.

NOSEWORTHY, Appellant; OVERSEERS OF BUCKLAND-IN-THE-MOOR, Respondents.

1873.

Nov. 18.

Overseers have no authority to alter the copy of the register transmitted to them by the clerk of the peace, but must publish it in its integrity.

Therefore, where upon a change in the abode of a county voter the list transmitted by the clerk of the peace was altered accordingly by the overseers, and published by them in its altered state: *Held*, that a notice of objection sent by post, addressed to the voter's place of abode as described in such published list, was not addressed to his "place of abode as described in the *List of Voters*," within 6 *Vict.* c. 18, s. 100, and consequently that there had been no sufficient service of the notice under that section.

AT a Court held by the Revising Barrister appointed to revise the List of Voters for the eastern division of the county of *Devon*, *Robert Tucker* objected to the name of the appellant being retained on the list of voters for the parish of *Buckland-in-the-Moor*, in the said division.

The Barrister called on the objector to prove his notice of objection to the voter, when the following facts appeared:—

On the copy of the part of the register of voters of the

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said Eastern division relating to the said parish, sent by the clerk of the peace of the said county to the overseers of the poor for the said parish, the name of the said voter appeared as follows:—

Robert Nosewortlıy	*Boddacleave* in this parish	House and land as occupier	*Boddacleave*

The overseers, knowing that the appellant had ceased to occupy or reside at the said farm called *Boddacleave*, and was now occupying and residing at a farm called *Bowden*, in the same parish, before publishing the list erased the words "*Boddacleave* in" in the second column, and "*Boddacleave*" in the fourth column, and inserted the word "*Bowden*" in each column, and they duly signed and published the list so altered.

In the list published by the overseers, therefore, the name appears as follows:

Robert Nosewortlıy	~~*Boddacleave in*~~ this parish *Bowden*	House and land as occupier	~~*Boddacleave*~~ *Bowden*

The original copy of the register sent to the overseers was printed, and the alteration was in writing.

The objector duly sent by post to the voter a notice of objection, founded on the third and fourth columns of the register, which was in all respects in the form given by the 28 & 29 *Vict.* c. 36, sched. A., No. 2, unless it was defective in the matters hereinafter mentioned, and such notice of objection was posted in due time by the objector.

The notice of objection was addressed as follows:—"To Mr. *Robert Nosewortlıy*, of *Bowden Farm*, *Buck-*

land-in-the-Moor;" this was the correct address of the voter at the time the notice was sent.

On behalf of the voter it was objected that the notice was insufficient, and that the Revising Barrister had no power to erase the voter's name—first, because the alteration made by the overseers in the copy of the register sent to them was unauthorised and void, and the notice ought therefore to have been addressed to *Boddacleave*, and not *Bowden* Farm; secondly, because the said notice should have, at any rate, been addressed *ipsissimis verbis* of the list, as published by the overseers, and the second line should therefore have been "this parish *Bowden*" instead of *Bowden* Farm; thirdly, it was further contended on behalf of the voter that the Revising Barrister had no power to expunge his name from the register, inasmuch as the alteration was a mistake of the overseers within the meaning of 6 *Vict.* c. 18, s. 40, which the Revising Barrister was bound to amend, and that having made such amendment, and restored the list to its original condition, no person of the name of *Robert Noseworthy*, living at *Bowden*, and qualified in respect of a farm called *Bowden*, would appear on the said list, and the notice of objection would for this reason be null and void.

On behalf of the objector it was answered—first, that the copy of the register, which is by the 6 *Vict.* c. 18, s. 6, made the list, and which is referred to in 28 & 29 *Vict.* c. 36, sched. A, No. 2, was the copy signed and published by the overseers, and it was, therefore, the address upon the list so signed and published, to which the notice ought to be addressed; second, that even if a correct copy of the original register was to be taken to be the list, the published copy being authenticated in

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the mode provided by the Act, and published by the persons authorised to do so, an objector was justified in assuming it to be a correct copy of the register and acting upon it, and a notice addressed by him accordingly was sufficient; third, that the objector having no means of knowing that the alteration was made by the overseers, and having taken reasonable means to comply with the Act, the notice was a sufficient compliance therewith; fourth, that if a notice, addressed according to the list published by the overseers were insufficient, an alteration made by the overseers would render it impossible that the person whose address was altered should be objected to, while no inconvenience would be inflicted on the voter by holding a notice directed to the altered address to be sufficient, because every voter must inspect the published list in order to be sure that he has not been objected to; the voter might, therefore, be taken to be aware of any alteration made in the list; fifth, that it was not necessary that the notice should contain a fac-simile of the address given on the list, if it gave its meaning without any variation, which the notice of objection in the present case did; sixth, that no amendment made by the Revising Barrister in the list could prevent the notice having been properly addressed at the time it was sent, or affect its validity; seventh, that, even if the Revising Barrister was bound to amend the list by restoring the word *Boddacleave* and erasing the word *Bowden* in the second and fourth columns, he was not bound to do so before deciding upon the validity of the said notice of objection, and that, as *Bowden* was the then address of the voter, he should so exercise his discretion, if any, as to uphold the said notice of objection.

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The Revising Barrister held that the notice of objection was sufficient, and that he ought not to exercise his discretion, if any, to amend the list till after he had decided upon the notice of objection, and that no alteration, if made by him in the said list, would affect the validity of the notice. He, therefore, called on the voter to prove his qualification as stated in the original list, or in respect of the qualification appearing on the list as altered by the overseers. This was not done, and the Revising Barrister thereupon expunged the name of the voter.

The question for the opinion of the Court was whether the notice of objection was good, and whether the Revising Barrister had power to expunge the name of the appellant from the register of voters.

The objector declining to support the decision, the Revising Barrister made the overseers respondents.

G. Lewis, for the appellant. The voter ought not to have been called upon to prove his qualification, since the service of the notice of objection through the post-office, which was the service relied on, was insufficient, the notice of objection being wrongly addressed. The notice should have been addressed to the person objected to "at his place of abode, as described in the said *list* of voters," as prescribed by 6 *Vict.* c. 18, s. 100, which section deals with the case of a notice served by post. The question no doubt is what that section means by the "said *list* of voters"; but if, as will be shown hereafter, it means the list which the overseers are directed to publish, and not one which, as in the present case, they have first altered without authority, and then published, the address of the notice was clearly wrong. If

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wrong, the Court will not assume, without proof, that it was in fact received. No evidence was adduced before the Revising Barrister of the notice having reached the hands of the person objected to, so as to lead to the inference of personal service. Whether the voter was present in person at the Court of Revision is not distinctly stated, but, even if that be assumed, it at most only shows that at the time of the revision the notice had come to his knowledge. In *Allen* v. *Greensill* (*a*), which was the case of a borough vote, the case showed that the voter was present at the Court of Revision, yet the service of the notice of objection was held insufficient, because it had not been left at the voter's place of abode, "as stated in the list." It is true that, in that case, the notice had not been served at the actual place of abode, but service even at the actual place of abode is insufficient, if the notice does not reach the person objected to. In *Bishop* v. *Helps* (*b*), *Byles*, *arguendo*, said, "Suppose this notice had been sent by post to the voter's actual place of abode, and it had never reached him?" To which *Maule*, J., replied, "That clearly would not do, there is no provision for that." It is not disputed that, under sect. 7 of 6 *Vict.* c. 18, the service might be personal, or by leaving the notice at the place of abode as described in the list, but here the only service attempted was service by the post under sect. 100. The only question then is, what is the "list of voters" referred to in sect. 100? The reference, it is submitted, is to the copy of the register then in force, which, by 6 *Vict.* c. 18, s. 3, and 28 & 29 *Vict.* c. 38, s. 3, the clerk of the peace is to send to the overseers,

(*a*) 1 *Lutw.* 592; *S. C.*, 4 *C. B.* 100.
(*b*) 2 *C. B.* 52; *S. C.*, 1 *Lutw.* 353.

and which, together with the list of claimants, is by sect. 6 of the former Act, to be deemed the "list of voters." The overseers, being directed to publish this copy of the register, should do so in its integrity. They have no power to alter it, their only power in this respect being under 6 *Vict.* c. 18, s. 5, to add the words "dead" or "objected" in the margin. In case there be no list made out or published by the overseers, sect. 27 provides that, in that event, the register then in force "shall be taken to be the list of voters." The argument on the other side must be that the list must be that which the overseers in fact publish, not that which they ought to publish. But that surely cannot be so, as it would enable the overseers to disfranchise persons on the register as they pleased, by omitting their names in the published lists. Moreover, a list so made out would not be a copy of the register "then in force," but of the register as altered without authority by the overseers. It has been suggested that, *Davies* v. *Hopkins* (*a*), affords an argument in favour of the Revising Barrister's view, but it is difficult to see its applicability. The only question there involved was, whether the Revising Barrister could call for proof of the signature to a notice of claim, which on its face was sufficient, after the claimant's name had been inserted by the overseers in the list of claimants.

No one appeared on behalf of the respondents.

KEATING, J. I am of opinion that the decision of the Revising Barrister should be reversed. The duties of the Revising Barrister are prescribed by sect. 40 of the 6 *Vict.*, c. 18, and very precise directions are there

(*a*) *K. & G.* 118; *S. C.*, 3 *C. B. N. S.* 376.

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given as to his duties in reference to the list, as well as to the steps to be taken on the revision. The Legislature, in all probability, desired to leave as little as possible to discretion, and it has therefore laid down distinct rules, on which the Revising Barrister is to act. Sect. 40 enacts that "where the name of any person inserted in any list of voters shall have been objected to by the overseers, or by any other person, and such other person so objecting shall appear by himself or by someone on his behalf in support of such objection, and shall prove that he gave the notice or notices respectively required by this Act to be given by him, every such barrister shall *then* require it to be proved that the person so objected to was entitled on the last day of *July* then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list." It is therefore a condition precedent to the calling upon the party objected to to prove his qualification, that the party objecting should appear by himself, or some one on his behalf, and prove that he gave the notice which the Act requires. Here the objector did appear before the Revising Barrister, and objected to the name of the appellant, and proved that he sent by post a certain notice of objection. Was that, then, such a notice of objection as the Act requires? As to this, let us first of all look at the duties of the overseers. Sect. 3 of 28 & 29 *Vict.* c. 36, provides that the clerk of the peace shall transmit to the overseers a sufficient number of copies of the part of the register relating to their parish or township, and that the overseers shall, on the 20th day of *June* in every year, "publish a copy of the register then in force relating to their parish or township;" and there is a similar enactment in 6 Vict.

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c. 18, s. 5, as to publication on the 1st of August. It is clearly, therefore, the duty of the overseers to publish that which is sent them by the clerk of the peace, viz., the copy of the register then in force for their parish. Then, what is prescribed as to the notice of objection? As to this, we find that the voter may be objected to by any person upon the register, and every person so objecting is to give notice of objection, the notice being prescribed by sect. 7 of 6 *Vict.* c. 18, but the form now given applicable to this case being No. 2, schedule A, in 28 & 29 *Vict.* c. 36. In accordance with that form, the objector is to address his notice to the place of abode of the person objected to *as described in the list.* What, then, is the list? For this, the Act of Parliament refers us to the copy of the register which the clerk of the peace is directed to send to the overseers, and which the overseers are required to publish. I think that they are bound to publish it in its integrity, as they receive it from the clerk of the peace. The difficulty here has arisen from their not so publishing it, but altering the qualification and place of abode of the appellant from its description as it appeared on the register. By this, the objector was no doubt misled, and accordingly he adopted the description of the place of abode as altered by the overseers, and not as it was transmitted to them by the clerk of the peace. The Act provides that the person objecting may prove his notice of objection in one of three ways:—that he gave it to the person objected to personally; that he left it at his place of abode as described on the list; or that he sent it by post. Here the objector adopted the last method, and attempted to make out his case by proving that he sent a notice

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through the post. But his proof was of a notice addressed to the abode of the person objected to *as altered* by the overseers, and not as it appeared on the register and was received from the clerk of the peace. The only question, then, is, is that a compliance with the Act? We are not embarrassed with any question that might have arisen if, having failed to prove a proper notice by the post, the objector had attempted to resort to one of the other modes of service. My present impression is that it would have been competent for him to have done so, though probably he might then have been met by an objection as to the form of his notice. But at all events he did not do so; and the only proof attempted being proof of a service by post, I think that the proof adduced does not show a compliance with the Act. Before the person objected to can be *called upon* to prove his qualification, the objector must prove that he gave notice of objection, and if, as in this case, he relies for that purpose on sect. 100, he must prove in the words of that section that his notice was "directed to the person to whom the same shall be sent, at his place of abode *as described in the said list of voters.*" I think that "the list" means the list which the overseers are bound to publish, and if the overseers take upon themselves to alter that list instead of publishing it as they receive it, any person acting upon that alteration must do so at his peril. I can quite understand the grounds on which the Revising Barrister has proceeded, but although I might wish to support his decision, I feel that there has not, upon the words of this statute, been proof of such a notice as the Act requires; and consequently that the decision must be reversed.

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BRETT, J. The real question in this case seems to be whether the Revising Barrister was in a position to call upon the person objected to, to prove his right to be on the register. The Revising Barrister is not authorised to call on everyone to prove his qualification, but, under 6 *Vict.* c. 18, s. 40, a limited authority is conferred upon him. That authority is made by sect. 40 to depend upon this condition precedent, that the objector shall appear by himself, or some one on his behalf, and prove that he gave the notice or notices required "by this Act," words which, by reason of the incorporation of subsequent statutes, must be read as referring to "this Act" and "any Act incorporated therewith." Now, in the case of counties, the notices required are given by sect. 7 of 6 *Vict.* c. 18 and sect. 6 of 28 & 29 *Vict.* c. 36. Under sect. 7 of 6 *Vict.* c. 18, the service of the notice on the person objected to may be in one of two ways. The words as to this are, "the person so objecting shall" "give or cause to be given to the person objected to, *or* leave or cause to be left at his place of abode, as described in such list, a notice," &c. But a further mode of service is provided by sect. 100, which deals with the sending of the notice by the post "directed to the person to whom the same shall be sent, at his place of abode, as described in the said list of voters." That section confers a great privilege on the objector, since, according to the decision of *Bishop* v. *Helps*, (*a*) where sect. 100 is complied with, the production of the stamped duplicate is *conclusive* evidence of the delivery of the notice, and of its delivery in due time; and it is no answer on the part of the person objected to, to show that it was not received by him in

(*a*) 1 *Lutw.* 353; *S. C.*, 2 *C. B.* 45.

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due time, or that it was never received at all. That being a great privilege to an objector, I think that if he avails himself of it he must prove his notice strictly. If he avails himself of the privilege, that raises the question how the notice is to be directed; and as to this, sect. 100 says, "to the person to whom the same shall be sent, at his place of abode *as described in the said list of voters.*" What, then, is the list of voters? The 6 *Vict.* c. 18, after providing for the sending by the clerk of the peace to the overseers of a copy of the register, and for the making out by the overseers of a list of claimants, enacts in sect. 6, "that the list of claimants (if any) so to be made out, &c.," "together with *the said copy of the register* with the marginal additions, &c.," "shall be deemed to be *the list of voters.*" And under 28 & 29 *Vict.* c. 36, s. 3, the overseers are bound to publish, on or before the 20th of *June*, "a copy of the register *then in force.*" Therefore the copy of the register *then in force*, together with the list of claimants, and now also (*a*) that of the £12 occupiers, constitutes the "list of voters." And consequently one who objects to a person on the register, if he elects to prove his notice by proving delivery at the post office, must take care that his notice is correctly addressed according to the copy of the register then in force. Now it may be that the overseers have wholly failed to publish *any* list of voters. In such a case, the register in force is still to be the "list of voters" (*b*), and the objector must take care that his notice of objection is correctly addressed in accordance

(*a*) 31 & 32 *Vict.* *c.* 58, *s.* 19.
(*b*) 6 *Vict.* *c.* 18, *s.* 27.

with it. It may be that by some blunder a breach of the Act of Parliament has been committed in not publishing a correct copy of the register; but whether that be punishable or not is not material to our inquiry, since it cannot relieve the objector from conforming to the plain language of the enactment by proving an address to his notice in accordance with the existing register. Has, then, the objector proved what he was bound to prove in the present case? If we are to assume, as I agree that we must, that the only evidence of service offered before the Revising Barrister was that of service by the post, I think that he has failed to comply with the required condition precedent. He has not given proof of a notice addressed in accordance with the list, but in accordance with something which the overseers have imprudently and negligently published as the list. On the authority of *Norris* v. *Pilcher* (*a*), I think that it would have been competent to the objector, after failing to prove service under sect. 100, to have proved, if he could have done so, service in another mode under sect. 7. On the case before us, however, I assume that no such proof was attempted, and that the case was left to stand on the service by post, and I therefore agree that the decision of the Revising Barrister should be reversed.

GROVE, J. I am of the same opinion. The question depends on the construction of sect. 100, and the meaning to be there ascribed to the words "in such respective *lists* as aforesaid," and the subsequent words, "as

(*a*) 1 *Hopw. & Colt.* 173; *S. C. L. R.* 4 *C. P.* 417.

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described in the said *list* of voters." *Primâ facie* one might suppose that, the publication of a list by the overseers having been provided for in a previous section, the list published by the overseers would be that to which sect. 100 would be made to refer. On looking back, however, at the previous sections, I have been unable to find any provision under which the list published by the overseers is made the only authorised list, and Mr. *Lewis* informs us that there is no such provision. He is, moreover, confirmed in this by the statements in the case, which only refer to sect. 6. We are therefore thrown back on sect. 5, which, after directing the overseers to prepare a list of claimants, and giving to them certain limited powers of making marginal additions therein, and in the copy of the register received from the clerk of the peace, by adding in the margin the words "dead" and "objected," proceeds to enact, that "the overseers shall cause a sufficient number of copies of such list of claimants, and of the said copy of the register, with all such marginal additions as aforesaid, to be written or printed, and shall, on or before the 1st day of August, sign and publish the same. Now if the list of which sect. 100 speaks be the list of claimants and copy of the register which sect. 5 directs to be published, then what has been published here is not such a list, but a list amended by the overseers, and not amended by them in the exercise of any power conferred on them by statute. Has, then, the objector complied with the requirements of sect. 100, so as to entitle him to the privilege conferred by that section. That section requires the notice to be sent by post, "directed to the person to whom the same shall be sent, at his place of abode, as described

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in the said list of voters." Here the notice was not so directed. It was directed to some other place, which may be the true place of abode of the person objected to, but which is not his place of abode "as described in the list of voters." It follows, that the requirements of sect. 100 have not been complied with. This no doubt entails some hardship on the objector, since, by a mistake of the overseers, for which the objector is not to blame, a person not entitled to vote may remain on the register. But the other construction of the word "list" would entail a still greater hardship, for a person would then be liable to be disfranchised by an unauthorised alteration on the part of the overseers. I think that the power of making such an alteration should be given in express terms where it is intended, and that here the case is made stronger by the fact that certain limited powers are expressly given to the overseers.

DENMAN, J. I am of the same opinion. I own that it does seem to me hard that the objector should be deprived of the power of objecting, simply by the laches of the overseers. The question, however, turns on the 6 *Vict.* c. 18, s. 100, and all we have to do is to construe that section. I think that the copy of the old register, except so far as the overseers can legally alter it, is that to which reference is made, and that the alteration which the overseers have here made being a wholly unauthorised act, the objector, in order to comply with sect. 100, was bound to send his notice directed to the voter's address as it is described in the old register. This he has not done, and the decision of the Revising Barrister must be reversed. It would, how-

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ever, have been more satisfactory to me, if the case had been argued on both sides.

Decision reversed.

Attorney.—For Appellant, *Coode, Kingdon, & Cotton.*

DURANT, Appellant; CARTER, Respondent.

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The borough vote was claimed for a glebe-house by the rector. He had been abroad from *October* to *June* of the qualifying year, having gone abroad under a licence from the bishop. During his absence a curate under a licence from the bishop which required him to reside, resided at the glebe-house; three of the rooms were reserved and locked up, and the key of them left with a servant who had been employed by the rector, but who was paid by the curate. The curate could not have been required to leave the glebe-house, if his rector had returned there, without being provided with accommodation elsewhere. During the other periods of the qualifying year the rector had been in residence. *Held*, that his residence was insufficient to qualify for the borough franchise.

AT a Court held by the Revising Barrister appointed to revise the list of voters for the borough of *New Windsor*, the appellant duly objected to the name of the respondent being retained in the list of persons entitled to vote in respect of property occupied within the parish of *Clewer*, at the election of a member for the borough of *New Windsor*. The name of the respondent appeared in the list as follows:—

Carter, Thomas Thellusson	The Rectory	House	The Rectory

The following facts were established by the evidence:

The respondent was, and had been for some years, the rector of *Clewer*. In the year 1871, he petitioned the bishop of the diocese for a licence to absent himself from his benefice. On the 17th of May, 1871, the

bishop granted a licence, of which the following is a certified copy:—

"*John Fielder*, by divine permission, Lord Bishop of *Oxford*, to our beloved in Christ, Canon *Thomas Thellusson Carter*, clerk in holy orders, rector of *Clewer*, in the county of *Berks*, within our diocese, greeting. We do hereby license you to be absent from your said benefice until the 31st day of December, 1872, on account of illness, as medically certified unto us, you having provided for the due and proper performance of the duties of your benefice to our satisfaction. Given under our hand this 17th day of May, in the year of our Lord 1871."

"N.B.—The Act directs that a copy of this licence shall be transmitted by the incumbent to the churchwardens within one month from the granting thereof, to be deposited by them in the parish chest, and that a copy of the same shall be produced by the churchwardens, and publicly read at the visitation of the archdeacon."

The licence bore the episcopal seal and signature.

Upon the certified copy of this licence produced in evidence was the following indorsement:—

"Diocese of *Oxford*,

"The Rev. *T. T. Carter*, *Clewer*.

"(Copy) License of non-residence,

"under 1 & 2 *Vict.*, c. 106, sect. 43, &c."

On the 18th May, 1871, the bishop granted a licence to Mr. *Edward Dunkin Harrison* to act as curate in the parish of *Clewer*, at the yearly stipend of £100. He was to reside in the parish.

On the 7th September, 1871, the bishop granted a licence to *Sydney Malet Scroggs*, which was as follows:—

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"*John Fielder*, by divine permission, Lord Bishop of *Oxford*, to our beloved in Christ, *Sydney Malet Scroggs*, clerk in holy orders, M.A., greeting.

"We do by these presents give and grant unto you, in whose fidelity, morals, learning, sound doctrine, and diligence we do fully confide, our licence and authority to perform the office of stipendiary curate in the parish of *Clewer*, in the county of *Berks*, and within our diocese and jurisdiction, in reading the common prayers, and performing other ecclesiastical duties belonging to the said office, according to the form prescribed in the book of Common Prayer, made and published by authority of Parliament and the canons, and constitutions in that behalf lawfully established and promulgated, and not otherwise or in any other manner (you having first, in the presence of our commissary, duly appointed, made and subscribed the declaration of assent and taken the oath of canonical obedience to the bishop, as required by law to be made, subscribed, and taken). And we do by these presents assign you the yearly stipend of £75, to be paid quarterly, for serving the said cure, together with the use of the glebe-house (wherein we require you to reside), garden, and offices, free from payment of any rent or taxes in respect of the same. In witness whereof we have caused our episcopal seal to be hereto affixed. Dated the 7th day of September, in the year of our Lord 1871, and in the second year of our consecration."

"Note.—The bishop will revoke the licence, and will not countersign the testimonials of any curate who accepts a smaller stipend than the sum assigned in the licence, or who undertakes the duty of another cure without the bishop's sanction, or who resigns the curacy

to which he is licensed without giving the bishop due notice of his intention. In ordinary cases, three months' notice will be required."

"A true copy.

"*John M. Davenport,*

"Deputy-registrar of the Diocese of *Oxford.*"

Upon the certified copy of this licence, produced in evidence, was the following indorsement:—

"(Copy.)

"(Stipendiary Curate's Licence.)"

The respondent remained in possession of his house until some day in the early part of October, 1872, when he left the house and went abroad for the winter, with the intention of returning in the spring. Before leaving, he arranged with the bishop that Mr. *Scroggs* should be in the parish as an additional helper, and, before the licence to Mr. *Scroggs*, hereinbefore set out, was obtained, he had made an arrangement with Mr. *Scroggs* that he should be there as an additional helper. The respondent had nothing to do with the application of Mr. *Scroggs* to the bishop for the licence. Before leaving, the respondent arranged with Mr. *Scroggs* that three rooms in the house should be retained by the respondent for his own use. Those three rooms were locked up, and the key left in the possession of a servant who had been employed by the respondent, but who was paid by Mr. *Scroggs*. When the respondent had quitted the house, Mr. *Scroggs* went to reside in it, and remained there till the month of June, 1873. It was asserted by the respondent that Mr. *Scroggs* so resided in the house by his permission, but that if he had returned from abroad before the month of June, 1873, he could not have required Mr. *Scroggs* to leave the house unless he

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had provided some accommodation for him elsewhere. There was no evidence before the Revising Barrister to show that Mr. *Scroggs* did not reside in the house by permission of the respondent, except such evidence as is supplied by the documents set out in this case. The respondent did not return to the house until the month of June, 1873, when he resumed possession of the house. The respondent was rated for the house, and paid the rates.

It was contended, on behalf of the respondent, that the residence and occupation were sufficient to entitle him to have his name retained on the list of voters.

It was contended, on behalf of the objector, that the question rested entirely upon 1 & 2 *Vict.* c. 106; that the licences hereinbefore mentioned were founded upon the said Act, and that under the said Act it was not possible to make any reservation of rooms in the house.

The Revising Barrister was of opinion that there was proof that the respondent had occupied the house, and resided therein sufficiently to entitle him to vote in respect thereof, and that the provisions of the statute above referred to did not prevent him from being so entitled. He was also of opinion that, inasmuch as the licence granted to Mr. *Scroggs* was not shown to have been granted under the provisions of the said statute, and did not on the face of it, or by reference, appear to have been made under the provisions thereof, and did not appear to be according to the terms of the said statute, he ought not to hold that the residence of Mr. *Scroggs* in the house was not, as alleged by the respondent, by his permission; and he retained the name upon the said list of voters.

If the Court should be of opinion that the decision was wrong, the list of voters was to be amended by expunging the name of the respondent from the said list.

KINGDON, Q. C., appeared for the Appellant.

The Court called upon—

Gorst for the respondent. The Revising Barrister having found the occupation and residence to be sufficient, that is a question of fact upon which the Court will not review his decision. The only question for the Court is whether, notwithstanding that finding of fact, there is anything in the provisions of the Pluralities Act, 1 & 2 *Vict.* c. 106, which operates to disentitle the respondent to the franchise.

[GROVE, J. The Revising Barrister decides on two points: First, that there was proof that the respondent had occupied the house, and resided therein sufficiently to entitle him to vote in respect thereof. Secondly, that the provisions of the statute (1 & 2 *Vict.* c. 106) did not prevent him from being so entitled.]

In the argument before the Revising Barrister, the appellant rested his case solely on the effect of the statute, and it is submitted that he is concluded by the points he then made. If, however, the Court be of opinion that both points are now open, it will be necessary to enter on a discussion of the general question.

The points for consideration then are: First, the occupation, next the residence, and, lastly, whether the occupation and residence, if otherwise sufficient, are

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prevented from being so by the operation of the Pluralities Act (1 & 2 *Vict.* c. 106).

[BRETT, J. Do you contend that this case raises the question under sect. 27 of the Reform Act, or that you can support the vote under sect. 3 of the Representation of the People Act?]

It is competent for the respondent to support the qualification under either Act. Although the value of the glebe-house does not appear to have been expressly found, there can be no doubt that it far exceeded £10 annually.

First, then, as regards the occupation. Occupation no doubt is required, as well under the Act of 1832, as under the Act of 1867, during the *whole* twelve months of the qualifying year. But personal occupation is not required, for a man may occupy by his goods. In *Reg.* v. *the Inhabitants of St. Mary Kalendar* (*a*), *Lord Denman*, C.J., said: "It cannot have been meant that no occupation could take place without a personal residence. A man might occupy by bales of goods." And *Coleridge*, J., said: "Suppose he had gone away without any *animus redeundi*, but had left a person on the premises; would not that have been an occupation? And, if so, may he not occupy in the same manner by his goods?" Here, whatever occupation the curate had was merely by the permission of the rector, and as the rector's representative. The furniture was the rector's, and the rector, not the curate, was the rateable occupier under the statute of *Elizabeth*. There were also three rooms in the house which were locked up and expressly reserved. In con-

(*a*) 9 *Ad. & E.* 626.

templation of law, whether for rating or registration purposes, the rector must be regarded as the occupier of the whole house, even if it be assumed that the curate was tenant of the part not reserved by the rector, or that he occupied that part by virtue of some agreement between them. *Reg.* v. *the Mayor of Eye* (*a*), *Rex.* v. *the Inhabitants of Great Bentley* (*b*), *Daniel* v. *Coulsting* (*c*), *Lee's Case* (*d*), *Robinson's Case* (*e*), are also strong authority on the question of occupation. Then on the question of residence. The *Winchelsea Case* (*f*), is important and in point. There the mayor, jurats, and freemen, *inhabitants*, had votes at elections, but, by a bye-law, the right had been attempted to be limited to such freemen and jurats as should be inhabitants by the space of three months before the election. Two persons were not allowed to vote, by reason of non-residence. They had an empty house in the town, for which, however, they were rated, and had dwelt therein within a year and a day, but not for three months before the election. The House resolved, that the voters in question, by the common law of England, are such *inhabitants* as ought to have voices, *their said non-residence notwithstanding;* because it appeareth not that they removed elsewhere with a purpose there to settle, and never to return to *W.* again; and though they kept no servants nor family at *W.*, yet they kept their houses in their own hands, and might return at pleasure. So here, apart from the 1 & 2 *Vict.* c. 106 (which will be dealt with immediately), the respondent had always a house, to which he might return at pleasure. The curate could

(*a*) 9 *Ad. & E.* 670.
(*b*) 10 *B. & C.* 520.
(*c*) 1 *Lutw.* 230; *S. C.*, 7 *M. & G.* 122.
(*d*) *Bar. & Aust. El. Cas.* 12.
(*e*) *Bar. & Aust. El. Cas.* 335.
(*f*) *Glanv.* 12, 13.

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not have refused to go out at once, if other accommodation were provided for him.

Thirdly, as to the operation of the 1 & 2 *Vict.* c. 106. It is submitted that no interest whatever in the house of residence could pass to the curate by virtue of the licence granted by the bishop. The licence is not framed under the authority of that statute, so as to pass an interest by virtue of it. It cannot operate as an assignment under sect. 93, even assuming that, in the instrument of assignment, the words of that section need not be precisely followed. Sect. 93 authorises the bishop to assign, "during the time of such curate's serving the cure, or during the non-residence of the incumbent of such benefice." But the language of the licence contains no such limitation, nor does it appear to have had that section at all in view. Its language appears to be borrowed from sect. 84, which is a section regulating the amount of the curate's stipend, according as it is, or is not, accompanied with the use of the house of residence. Suppose the rector had returned from abroad during the winter, what would have been his legal rights in respect of his house? It is submitted that it would have been competent for him to have gone into residence at once, and that there is nothing in the 1 & 2 *Vict.* c. 106, which could have precluded his doing so.

[KEATING, J. Could the rector have remained abroad, and let the house during his absence?]

He could not; but only because that is provided against by sect. 59, which, in express terms, avoids contracts for letting entered into under such circum-

stances. In the present case, it is material to consider the date of the licence. The licence is dated *September*, 1871, while until *October*, 1872, in the qualifying year, the rector is stated to have remained in possession. Either, therefore, the power which the licence of *September*, 1871, purported to confer in reference to the use of the glebe-house, was never exercised at all, or, if exercised, it had been determined by the rector, prior to the 31st of *July*, 1872, by a resumption of the possession. The rector's licence to absent himself from his benefice determined on the 31st of *December*, 1872, so that for the last seven months of the qualifying year he was bound to be in residence. This circumstance may, perhaps, make a distinction between the qualification claimed under the Reform Act, which requires only a six months' residence prior to the 31st of *July*, and that under the Representation of the People Act, which requires one of twelve.

Kingdon, Q.C., was not heard in reply.

COLERIDGE, C. J. I am of opinion that the decision of the Revising Barrister must be reversed. The respondent in this case is Mr. *Carter*, the Rector of *Clewer*, who in the year 1871 obtained a licence to be absent from his benefice from *May*, 1871, to the 31st *December*, 1872. It does not appear that Mr. *Carter* took advantage of this licence until *October*, 1872, when he went abroad, having before his departure arranged with the Bishop of the Diocese that Mr. *Scroggs* should be in the parish as an additional helper. Mr. *Carter* went away with the intention of being absent from his benefice and of spending the winter abroad, and he remained

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abroad until *June*, 1873. During his absence the rectory house was occupied by Mr. *Scroggs*, who occupied it under a licence from the bishop, and the licence required him to reside there. Reliance has been placed on the paragraph of the case, which states that "the respondent had nothing to do with the application of Mr. *Scroggs* to the bishop for the licence;" but I am of opinion that that cannot mean that Mr. *Carter* did not know of the application, or that it was not made with his assent and sanction. Mr. *Scroggs* remained in occupation of the rectory house until Mr. *Carter's* return in *June*, 1873; and the question is, whether, either under sec. 27 of the Reform Act, 1832, or sec. 3 of the Representation of the People Act, 1867, Mr. *Carter* is entitled to the borough franchise in respect of that rectory house.

Now it is quite true that, under the Reform Act, 1832, there may be an occupation of the qualifying premises, which is distinct from residing there, and which, nevertheless, qualifies the voter, provided he has resided during the required period within seven miles of the borough. But here the only residence set up is the alleged occupation of the rectory-house, and even if an occupation of that house by the rector could be made out, which would constitute an occupation within sec. 27, I think there was clearly no residence by him there, so as to satisfy the terms of the proviso at the end of that section.

It is still more clear that Mr. *Carter* was not an inhabitant occupier within 30 & 31 *Vict.* c. 102, s. 3. By the licence of the bishop Mr. *Carter* had gone abroad, and the bishop had authorised Mr. *Scroggs* to occupy the rectory-house. The bishop had the power

to do that, and, moreover, he did it with the assent of Mr. *Carter*; so that, by the authority of the law, and with the consent of the rector, Mr. *Scroggs* had been put into, and was in, the legal occupation of the premises. Mr. *Carter* himself admitted that he could not have determined the occupation without providing accommodation for Mr. *Scroggs* elsewhere. Under these circumstances, it is impossible to contend that the qualification can be sustained under either Act, and consequently the decision of the Revising Barrister must be reversed.

KEATING, J. I am of the same opinion. Mr. *Carter* attempts to sustain his qualification in two ways—as an "inhabitant occupier" under 30 & 31 *Vict.* c. 102, s. 3, or as an "occupier," under 2 & 3 *Will.* 4, c. 45. Was he then an inhabitant occupier during the *whole twelve months* required by the 30 & 31 *Vict.* c. 102, s. 3? I think not. During eight of those months he was residing abroad; and, putting aside the question whether he was at that time an occupier of the glebe-house, I think he was not an "inhabitant occupier" of it.

Under the 2 & 3 *Will.* 4, c. 45, a similar difficulty arises, viz., to make out residence, which is much the same thing as inhabitancy, for six months prior to 31st *July* in the qualifying year. Corporally, during nearly the whole of that period, Mr. *Carter* was at Rome. Now, there is no doubt that a man may have more residences than one, and hence the cases where it has been held that a man, while corporally present in one place, might, nevertheless, have a residence in another, because, during the whole of the period he was free to go there when he chose. But how is it sought

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to bring the present case within that principle? It is said that Mr. *Carter* could have returned from abroad whenever he chose, and gone at once into residence at the glebe-house. But he could only do that, on providing accommodation for the curate elsewhere; and even assuming he might have done it, on giving reasonable notice to the curate, in the present case he did not do so. During the whole time he was abroad, the curate was living at the glebe-house, using it under the licence of the bishop, by an authority derived from an Act of Parliament. Could Mr. *Carter*, during his absence abroad, have authorised some other person to go and occupy the glebe-house in which the curate was living? I certainly think not; and that there was here neither inhabitant occupancy nor residence during the period required by either Act.

BRETT, J. On looking at this case I feel no doubt that before the Revising Barrister the qualification was made to rest on the Representation of the People Act, 1867. The value of the glebe-house is not found, nor is there any express finding that Mr. *Carter* had no residence elsewhere within seven miles of the borough. I do not say that we might not *possibly* allow Mr. *Gorst* to support the qualification under the Reform Act, 1832; but I think it highly inconvenient, when a case has been stated under one statute, that the qualification under another should be relied on.

Now, the Court of Revision does not try titles, but existing facts; and here I cannot doubt that all parties acted with the intention of acting under the Pluralities Act, 1 & 2 Vict. c. 106. Mr. *Carter* assumed to act under it, otherwise he could not have gone abroad. It

is found that he went for the winter, intending to return in the spring, and that he arranged with Mr. *Scroggs* to serve the cure. He also arranged that three rooms in the glebe-house should be retained for his own use, and that Mr. *Scroggs* should pay the servant whom he left behind; so that it is clear he knew that Mr. *Scroggs* was going into the house. His acts upon leaving are not those of a person who is retaining the control over the premises. No doubt Mr. *Carter* asserts, not that at any moment he could have put an end to Mr. *Scroggs'* residence, but that the residence of Mr. *Scroggs* in the glebe-house was by his permission. We have it, then, that he knew of Mr. *Scroggs* being in the house, and that he did not object to it; and, further, he assumed Mr. *Scroggs* to be there by the licence of the bishop; for he says that he could not have required Mr. *Scroggs* to leave unless he provided accommodation for him elsewhere. I think that all parties assumed that the non-residence of Mr. *Carter*, and the actual occupation during his absence by Mr. *Scroggs*, was by virtue of the Pluralities Act, 1 & 2 *Vict.* c. 106, and the licence of the bishop; and that it is no answer to say that the terms of that statute have not been strictly complied with. From *October*, 1872, to *June*, 1873, Mr. *Carter* was away from the parish and borough, having gone abroad by leave granted from the Bishop, while Mr. *Scroggs* was actually residing at the glebe-house under the Bishop's licence. Can it be said, then, that Mr. *Carter* was an "inhabitant occupier" for the twelve months preceding the 31st *July*, 1873? Whether he was in one sense an occupier, it is not necessary to determine; he must fulfil both requirements; and I am clearly of opinion that he was not during that period

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an "inhabitant occupier." Where a man retains the dominion of his house, and goes away for an indefinite period, with the intention to return, it is a different case. But here Mr. *Carter* leaves his house for a definite period, with the intention (which he carries out) to reside elsewhere, because he cannot reside at the house which he leaves; and the bishop puts some one else into the house, not as Mr. *Carter's locum tenens*, but because Mr. *Carter* cannot reside there; and I think, under these circumstances, it would be contrary to common sense to say that Mr. *Carter* was residing at the house during that period. Whether Mr. *Carter* was in one sense an occupier, I decline to say. He was not an "*inhabitant* occupier" for the twelve months required by the 30 & 31 *Vict.* c. 102, s. 3; nor was he for the six months required by the 2 & 3 *Will.* 4, c. 45, s. 27, resident at the glebe-house, the only place of residence that is set up. There is, therefore, no qualification under either Act.

GROVE, J. If we were to hold that Mr. *Carter* was resident at the glebe-house, we should be carrying the doctrine of constructive residence to an absurd length; in effect we should by construction be converting non-residence into residence. The licence to Mr. *Scroggs* expressly requires him to reside; and Mr. *Carter* himself says that he could not return to the house without providing Mr. *Scroggs* with accommodation elsewhere.

Decision Reversed.

Attorney.—For the Appellant, *Durant*.
For the Respondent, *Phillips*.

FORD, Appellant; PYE, Respondent.

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The respondent, a parson, occupied as tenant and resided continuously in the house in respect of which he claimed the borough franchise, except that for two months, one of which (July) was in the qualifying year, he exchanged his house and duties with a brother clergyman (who resided more than seven miles from the borough). They also exchanged the use of their servants. The respondent reserved two rooms in his house, a bedroom and dressing-room, but only to prevent their being disturbed. He did not return nor contemplate returning during the two months. The annual value of the house was above 10*l*. Held: a break in the residence fatal to the franchise.

AT a Court held by the Revising Barrister appointed to revise the list of voters for the city of *Exeter*, the appellant duly objected to the name of the respondent being retained in the list of voters for the said city.

The following facts were proved:—The respondent is a clergyman residing within the city of *Exeter*, and is incumbent of the district parish of *Countess Wear*, near the said city, and he has for some years past, except as hereinafter mentioned, continuously occupied and resided in a house on the *Topsham* road, within the said city and district parish.

The said house does not belong to him as such incumbent as aforesaid, but is rented by him, and is of greater value than £10 a year.

In June, 1873, a clergyman named *Tordiffe*, who was vicar of *Southbroom*, near *Devizes*, in the county of *Wilts* (more than seven miles from the said city of *Exeter*), wrote to the respondent offering to exchange duties with him for the months of July and August, 1873, in order that they might each obtain for themselves and families, change of air and relaxation in their duties.

(The respondent and the said Mr. *Tordiffe* knew one another previously, as brother clergymen who had at one time resided in neighbouring parishes, but there

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was no evidence to show whether they were otherwise acquainted.)

The respondent assented to this proposal, and a correspondence of some length ensued, by which it was arranged that the respondent and his family should, during the said two months, reside in Mr. *Tordiffe's* vicarage, and Mr. *Tordiffe* and his family should reside at the respondent's house in the *Topsham* road.

It was further arranged that the respondent should take one servant with him, and leave the remainder in his house to wait upon Mr. *Tordiffe* and his family, and the respondent, at Mr. *Tordiffe's* request, engaged a boy for him to attend to a carriage which he took with him to *Exeter*. Similarly, Mr. *Tordiffe* agreed to leave his servants to wait on the respondent. It was also arranged that each party should use the vegetables and fruit in the garden of the house to which they went, except potatoes and wall fruit.

There was no agreement between the parties other than was contained in the said correspondence, and no payment was to be made by either of them to the other.

The respondent paid the wages of his servants during the said two months, although they waited on Mr. *Tordiffe*, and wrote once or twice during his absence giving directions to his servants as to their conduct. The respondent's house being larger than was required by Mr. *Tordiffe*, the respondent retained two rooms (a bed-room and a dressing-room), these either being locked up or occupied by one of the respondent's servants during his absence.

These rooms were not retained by the respondent with any intention of his using them while Mr. *Tordiffe* was staying in his house, but because they were usually

occupied by an invalid sister, who resided with him, and he was desirous that they should not be disturbed.

There was nothing to prevent the respondent sleeping in these rooms, if he had in law a right to return to his house during the said two months, but he did not, in fact, do so, and never contemplated or intended using them for that purpose.

The arrangement between the respondent and Mr. *Tordiffe* was fully carried out, and the respondent returned to *Exeter* at the beginning of *September*, 1873. The respondent had no residence, apart from the said house in the *Topsham Road*, within seven miles of Exeter.

It was submitted on the part of the objector:—First, that the respondent had not occupied the whole of his said house in the *Topsham Road* during the month of *July*, 1873, and that he had not resided within seven miles of the City of *Exeter* during the said month of *July*, 1873; and, in support of these propositions, the objector contended, first, that the agreement entered into by the respondent with Mr. *Tordiffe* amounted in law to a demise of the said house (or, at any rate, of the part of it not retained by him) to Mr. *Tordiffe* in consideration of the similar demise to him by the said Mr. *Tordiffe* of his said Vicarage; secondly, that the said Mr. *Tordiffe* was at least tenant at will of the said house, or the part of it retained by the respondent during the said month of *July*; and that, the respondent not residing in the house, Mr. *Tordiffe* had complete control over the part occupied by him, and was not a lodger so as to make his occupation in law the occupation of the respondent; thirdly, that the respondent's servants became, during the said two months, in

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law the servants of Mr. *Tordiffe*, and were bound to obey his orders, and, therefore, did not occupy the house on behalf of the respondent; fourthly, that the legal effect of the agreement between the respondent and Mr. *Tordiffe* was, that the respondent was not entitled to return to, or live in, his said house in the *Topsham Road* during the months of *July* and *August*, 1873, without Mr. *Tordiffe*'s consent, the rooms retained by him not having been retained for the purpose of residence, and not being capable of being so used by him without the use of other parts of the house; fifthly, that the respondent, whether or not he had a legal right to return, having, in fact, abandoned all intention of returning to the said house during the said months, and having allotted it to another purpose, did not reside there during the said months, within the meaning of the Acts relating to the franchise, even if in law he was entitled to sleep there.

On the part of the voter it was contended:—First, that the said Mr. *Tordiffe* was, during the said two months, in the position of a visitor to the respondent, and not a tenant, and that his occupation was in law the occupation of the respondent; secondly, that the servants of the respondent continued his servants, and had such a control over the house, as agents for the respondent, as prevented the residence in the house of Mr. *Tordiffe* amounting to an independent occupation in point of law, but that it was at most an occupation as a lodger: thirdly, that the occupation of the house being the respondent's occupation, the house still remained his residence, and that he had never abandoned the intention of returning to it, and that his mere temporary absence for change of air was no such abandonment;

fourthly, that, notwithstanding the said agreement, the respondent had a legal right to return to his house at any time during the said months, and that it was consistent with residence within the meaning of the Acts relating to the franchise that he should have formed the intention of living elsewhere for a time for the sake of change of air and relaxation, and made arrangements by which his return during such time was not contemplated, if he had a legal right to return at any time, and intended to return after a short interval.

The Revising Barrister expressed great doubt as to the correct legal inferences to be drawn from the facts of the case, but after some hesitation held, and, as far as it is consistent with the facts above stated, found, as a fact, that the respondent did not demise his house to the said Mr. *Tordiffe*, but only gave him a permission to remain with his family in the said house during the said two months. The Revising Barrister held further, as a matter of law, that under the circumstances hereinbefore stated, the servants of the respondent continued his servants, and that the occupation of the house by Mr. *Tordiffe*, and by the respondent's servants, was in law an occupation of the house by the respondent. He held further, that the true effect in law of the said agreement between the respondent and Mr. *Tordiffe*, and the facts hereinbefore stated, was to enable Mr. *Tordiffe* and his family to reside in the said house in the *Topsham Road*, but not to prevent the respondent from returning to his house in the *Topsham Road* at any time during the said month of *July*, 1873, and occupying it in any way which was consistent with the residence therein of the said Mr. *Tordiffe* and his family, and that the respondent could in fact have returned and

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slept in the rooms retained by him, without interfering with the residence of the said Mr. *Tordiffe* and his family in the said house. The Revising Barrister held further that, where a voter has a legal right to return and sleep in a house when he pleases, and an intention to return after a time to such house, the fact that he has no intention of returning during a given short period, it being then used for another purpose not physically inconsistent with his returning and sleeping therein, is not a break of his residence in the said house within the meaning of the Acts relating to the franchise. He therefore held, that the respondent had occupied his house in the *Topsham Road* for twelve calendar months previously to the 31st *July*, 1873, and had resided within seven miles of the city of *Exeter* during six calendar months preceding the same date, and allowed the vote.

The questions for the opinion of the Court were, first, whether the respondent resided in his house in the *Topsham Road*, during the month of *July*, 1873, within the meaning of the Acts relating to the franchise; secondly, whether the respondent occupied the whole of the said house in the *Topsham Road*, during the month of *July*, 1873.

If the Court should be of opinion on both questions in the affirmative, the list was to remain unaltered; if the Court should be of opinion on either question in the negative, the list of voters was to be amended by erasing the name of the respondent.

Kingdon, Q.C., for the appellant. The question in this case is, whether the exchange of houses that has taken place between the respondent and Mr. *Tordiffe*

constitutes a break in the respondent's residence, for, if so, that of course is fatal to the franchise. No doubt it may seem somewhat hard that, where two clergymen, for a temporary purpose, such as a change of air or relaxation, exchange their residences for a short period, that should create a forfeiture of the franchise. But hardship is not a safe criterion for the guidance of the Court. The Revising Barrister, as he expressly states, entertained great doubts in the case, and upon that ground apparently he has decided in favour of the franchise. The Court, however, will decide as to the right to the franchise, apart from any such consideration, and its decision will, it is submitted, be governed by the agreement which has been entered into between the parties. What then is that agreement? That it is in writing is clear, for it is expressly found that the whole of it is by correspondence. The only question, therefore, that can arise in reference to it must be as to its legal effect. We must therefore consider what that is. It is submitted that it amounts in law to a demise for two months. It has all the essentials of a demise. There is an agreement to let and to take for a term of defined duration, viz., two months, and there is good consideration. It is not essential to the validity of a demise that there should be a reservation of rent. Suppose that before the two months had expired, the respondent had returned to his residence, and evicted Mr. *Tordiffe*, can it be doubted that he would thereby have rendered himself liable to an action?

[BRETT, J. Could the respondent have been made liable in trespass?]

It is submitted that he could; but at all events

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he would have been liable for breach of his agreement.

[DENMAN, J. Suppose there had been a disturbance among the servants, would not the respondent have been entitled to enter and turn a servant out?]

Probably he would have been entitled to discharge a servant, but as regards the house it is submitted that Mr. *Tordiffe* was in occupation. The case falls clearly within the rule as stated in *Elliott* on Registration, and adopted by *Erle*, C.J., in *Powell* v. *Guest* (*a*), viz., that "in order to constitute residence a party must possess at the least a sleeping apartment, but that an uninterrupted abiding at such dwelling is not requisite. Absence, no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence; but if he has debarred himself of the liberty of returning to such dwelling by letting it for a period, however short, or has abandoned his intention of returning, he cannot any longer be said to have even a legal residence there." As regards the two rooms which were reserved by the respondent, it is expressly found that the respondent had never any intention to use them, but that he was desirous they should not be disturbed, because they were usually occupied by an invalid sister. If the respondent had contemplated returning every week for the performance of his Sunday duties, that might have been a different matter.

No one appeared on behalf of the respondent.

(*a*) *Hopk. & Ph.* 155, 156; *S. C.*, 18 *C. B. N. S.* 80.

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KEATING, J. In this case the Revising Barrister entertained considerable doubt, and found, with hesitation, in favour of the vote. I think, however, that the objection to it is well-founded, and the break in the residence clear, and, consequently, that the vote cannot be sustained. The respondent, for good consideration, gave up his house to Mr. *Tordiffe* for a period of two months. Whether or not the correspondence between the parties was such as to constitute a strict legal demise, it is, perhaps, not very material to inquire. It is distinctly found that the respondent did not return, or contemplate returning, during the two months. Mr. *Kingdon* has referred us to a statement in *Elliott on Registration*, which was adopted by *Erle*, C.J., in *Powell* v. *Guest* (*a*), and which affords a definition of residence, which clearly excludes the respondent from the franchise. "In order to constitute residence, a party must possess at the least a sleeping apartment, but an uninterrupted abiding at such dwelling is not requisite. Absence, no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence. But if he has debarred himself of the liberty of returning to such dwelling by letting it for a period, however short, or has abandoned his intention of returning, he cannot any longer be said to have even a legal residence there." I think that that statement contains the law and good sense of the matter, and, consequently, that the decision of the Revising Barrister must be reversed.

(*a*) *Hopw. & Ph.* 155, 156; *S. C.*, 18 *C. B. N. S.* 80.

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BRETT, J. I am of the same opinion. The respondent here, had, I think, given up the liberty of returning to his house for the space of two months; he certainly had abandoned the intention of doing so.

GROVE, J. The principle on which it is suggested that the Revising Barrister has decided, is one that I never could understand, viz., that in a case of doubt the decision should be in favour of the franchise. That at once raises the difficulty of what should be the amount of doubt in order to justify such a decision.

In the present case the finding of the Revising Barrister makes it clear that there was an abandonment by the respondent of the intention to return during the period of two months, and I think the case is within the rule in *Powell* v. *Guest* (*a*).

DENMAN, J. I agree. But in the absence of any argument in support of the Revising Barrister's decision, I abstain from any comment thereon. I think it very unsatisfactory that these cases should be decided without the opportunity of hearing argument on both sides.

Decision reversed.

Attorney.—For the Appellant, *J. Elliott Fox.*

(*a*) *Hopw. & Ph.* 155, 156; *S. C.*, 18 *C. B. N. S.* 80.

Ford, Appellant; Hart, Respondent.

Nov. 21.

The respondent, an officer in the army, was a freeman of Exeter, and was in the habit of living there, when on leave, in certain rooms appropriated for him by his mother in her house. His usual length of leave was three months in each year, and in the qualifying year he was on leave, and at his mother's house during January, February, and March. Except when on leave, he was with his regiment stationed more than seven miles from Exeter. Held that the respondent had not, for six calendar months next previous to the 31st of July, in the qualifying year, resided in Exeter, or within seven miles thereof, so as to entitle him to the franchise.

AT a Court held on the 22nd *September*, 1873, before the Revising Barrister for the city of *Exeter*, the appellant duly objected to the name of the respondent being retained in the list of persons entitled to vote in the election of members for the said city of *Exeter*.

The following facts were proved:—

The respondent is a duly admitted freeman of the city of *Exeter*.

The respondent is, and has been for several years, an officer in the army, and, except when on leave of absence, is stationed with his regiment more than seven miles from the city of *Exeter*.

The mother of the respondent (a widow) lives within seven miles of the city of *Exeter*, and previously to entering the army, and since he has been in the army, whenever he has obtained leave of absence from his regiment, he has lived with his mother in her said house.

The respondent has usually obtained leave of absence for three months in each year, and was, in fact, living in *Exeter* with his mother during the three months of *January*, *February*, and *March*, 1873.

The mother of the respondent has set apart two rooms in her house (one being a sleeping apartment), for the use of the respondent, in which some of his clothes and other property remain while he is with his regiment, and no other person sleeps in or makes any use of the said rooms while the respondent is away.

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The said rooms were so set apart for the exclusive use of the respondent during the whole of the six months preceding the 31st *July*, 1873, and the respondent had, during the whole of such time, his mother's permission to occupy the said rooms whenever he wished.

The respondent is not married, and has no home except the said house of his mother and his rooms in the barracks at which his regiment is stationed for the time being.

On behalf of the objector, it was urged that the voter had no residence within the borough or seven miles thereof; first, because the rooms which he used at his mother's house were rooms used by him as her guest, and to which he had no power himself to return unless she pleased, as there was no hiring of such rooms or consideration for their retention; secondly, because, being an officer in the army, he had no power of going home or anywhere without having first obtained leave, nor of throwing up his commission in the army at any time and returning home; thirdly, because, according to the evidence, he had only three months' leave every year, and therefore there could be no six months' residence as required by the statute; fourthly, because the case of *The King* v. *Mitchell* (*a*), did not apply, as that was held to be an inhabitancy by means of the family, and the voter in this case was unmarried, and further, that a militiaman was only occasionally called out for duty.

On behalf of the voter it was urged that, during the whole of the six months previously to the 31st *July*,

(*a*) 10 *East*, 511.

1873, he did reside within seven miles of the said borough, and that the arrangement with his mother not having been revoked, the voter had liberty to use the rooms set apart for him in her house, and that such house was *bonâ fide* his home and residence; that he had never abandoned such residence or the intention of returning to it, and that his occasional absence on the duties of his profession was no abandonment; that the circumstances of an officer in the regular army are the same as those of a militia officer on active service, and that the case of *The King* v. *Mitchell* (*a*), as affirmed by *Powell* v. *Guest* (*b*), is an authority for the voter's contention that he had a continuing residence at his mother's house. The Revising Barrister decided that the said voter continued to form part of his mother's family, and that he resided with her during the whole of the six months preceding the 31st *July*, 1873; that, as the mother had not revoked her permission to him so to reside with her, the fact that she might have revoked it was immaterial; that the fact of his absence on his professional duties with the army did not, according to the authority of *The King* v. *Mitchell* (*a*), as explained by *Powell* v. *Guest* (*b*), prevent his mother's house being his residence during the whole of the aforesaid period of six months, and allowed his vote.

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The question for the opinion of the Court was whether, consistently with the facts above stated, the Revising Barrister could legally find the respondent to have resided within seven miles of *Exeter* during the six months preceding the 31st *July*, 1873.

(*a*) 10 *East*, 511.

(*b*) *Hopw. & Ph.* 149; *S. C.*, 13 *C. B. N. S.* 72.

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Kingdon, Q.C., for the appellant. The decision of the Revising Barrister was wrong. The respondent had not, "for six calendar months next previous to the last day of *July*," resided in *Exeter*, or within seven miles thereof, so as to satisfy the requirements of 2 *Will.* 4, c. 45, s. 32. In the first place, during nine months of the year of qualification, and during four out of the six months immediately preceding the 31st of *July*, he was absent from *Exeter* as a matter of fact. It is said, however, that though not resident there in fact, he had the intention of returning, and did return to his mother's house in *Exeter* whenever he could get leave from his regiment. As to that, the case finds that his usual leave of absence was of only three months' duration. No doubt the case does not find in terms that the respondent could not have obtained longer leave, but it may be assumed that he availed himself of all that the authorities allowed. But in truth, the position of an officer in the army is inconsistent with the idea of constructive residence. It is contrary to the practice and profession of a soldier. His condition of life is necessarily migratory, and his place of abode from day to day uncertain. His movements are subject to the control of others. He is liable at any moment to be sent abroad, with no control over the duration of his absence. His leave may at any time be refused. He cannot retire from the service without the Queen's permission. And to this condition he has voluntarily subjected himself. The intention of the Legislature in insisting on residence was, it is submitted, that a voter might be a man having some position in the place where he voted, and possessed of

some knowledge of its wants, so as to enable him to select a fitting representative.

[GROVE, J. Suppose the respondent were not an officer in the army, do you say that in that case there would be an insufficient residence ?]

Perhaps then there might be a sufficient residence. But that cannot be admitted as clear. The respondent was a mere guest with his mother, and at any moment she might have denied him her house. *Bond* v. *the Overseers of St. George, Hanover Square* (*a*), is no authority on the point, for there the claimant had a legal right to reside. The main objection, however, arises out of the defendant's position as an officer in the army, and bound by military regulations to be on service with his regiment.

[BRETT, J. How do you distinguish *The King* v. *Mitchell* (*b*) ?]

There the voters were militiamen. They had houses, where their families resided; they returned from time to time to their homes and families, which were not broken up. As militiamen, they would only be called out for a limited period, and though they may have been out during the period at which residence was required, the case is distinguishable from that of a soldier, with whom absence is, so to speak, the rule of his life. Moreover, the question there was, as to inhabitancy within the charter of Norwich for six months before the

(*a*) *Hopw. & Colt*, 427 ; *S. C.* *L. R.* 6 *C. P.* 312.

(*b*) 10 *East*, 511.

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election, according to the oath imposed by 3 *Geo.* 2, c. 8, and not as to residence within the Reform Act.

No one appeared on behalf of the respondent.

KEATING, J. In this case I think that the right to the franchise has not been established; and that the respondent has not, consistently with the rules that have been laid down as to "residence" and the authorities on the subject, "resided" for six calendar months prior to the 31st of *July*, 1873, within the city of *Exeter*, or within seven miles thereof. I do not, by any means, mean to say that a freeman, who is living with his mother, and who can return to his mother's house whenever he pleases, might not, under such circumstances, "reside" so as to qualify, although his residence is, in a sense, permissive. But here the respondent, being an officer in Her Majesty's Army, is no longer a free agent. He cannot move about except at the will of Her Majesty, expressed through his commanding officer; nor can he return, without leave obtained, to his mother's house. It is true the case finds that the respondent had usually obtained leave of absence for three months in each year, and also that from that statement it does not necessarily follow that he might not have obtained it for a still longer period. But that does not remove the ground of the objection. The respondent is not *sui juris*. He cannot, at his own free will and pleasure, return to his mother's house. By entering the service of the Queen he has voluntarily incapacitated himself from doing so. The case of the *King* v. *Mitchell* (*a*) seems at first sight

(*a*) 10 *East*, 511.

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an authority in favour of the franchise. But there the question was one of inhabitancy within the charter of the city of *Norwich*. The voters were militiamen, having houses in *Norwich*, where their families resided, and in respect of which they were liable to public burthens, and the Court thought they were inhabitants within the charter. I am not aware of any case of similar circumstances to the present, where a claimant who has voluntarily put it out of his power to return to his house when he pleases has been held, nevertheless, to have a constructive residence. The actual residence of the respondent was for a period of only three months during the whole year of qualification. I think that there has been no sufficient residence here, and that the decision must be reversed.

BRETT, J. I am of the same opinion. I take the rule as it is laid down in *Powell* v. *Guest* (*a*), and the question we have to deal with is as to its application in the present case. The respondent during the greater part of the prescribed period was living and sleeping, and doing everything that constitutes dwelling, more than seven miles away from the city of *Exeter*, so that, as matter of fact, he did not actually reside there. Can he, then, for the purposes of the franchise, be said to have resided there constructively? It is said that he had liberty to return there, and no doubt in one sense he had. The case finds that during the whole period he had his mother's permission to return to certain rooms, which were specifically appropriated to him in her house, and within the city. But the difficulty in the respon-

(*a*) *Hopw. & Ph.* 149 ; *S. C.*, 18 *C. B. N. S.* 72.

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dent's way is, that he is an officer in the army, and being an officer in the army we must take notice of the fact that, without the leave of his sovereign, signified to him through his commanding officer, he cannot leave his regiment at all; he cannot quit the service of his sovereign and revert to the position of a civilian, without the royal permission. In *Powell* v. *Guest* (*a*), a person who, doubtless, would have been glad to return to his home if he had been able, was incapacitated from returning by his imprisonment, and it was held that he did not reside so as to be qualified. To compare such a case as that with the present may certainly appear unseemly, and it will be understood that I do it solely for the purpose of comparison. There, by a criminal act, the claimant had incapacitated himself from returning at his own free will and pleasure, so, here, he has incapacitated himself by his voluntary desire to do his duty. The only case that creates any difficulty as to our decision is *The King* v. *Mitchell* (*b*). There it was held, on the construction of the charter of *Norwich*, that the claimants, who had houses and families residing there, might be inhabitants within the charter, although they did not themselves dwell in *Norwich*. That case was not decided under the Reform Act; it was decided on different language, and I think it does not govern the present case.

DENMAN, J. My brother GROVE (*c*) requests me to say that he agrees in the decision, but that he thinks an observation of mine in the last case applies emphatically here, viz., that it is not satisfactory to have these cases

(*a*) *Hopw. & Ph.* 149; *S. C.*, 18 *C. B. N. S.* 72.

(*b*) 10 *East*, 511.

(*c*) *Grove, J.*, had left the court.

argued only on one side. The question is whether, on the facts stated, residence is made out. The Revising Barrister held that it was. Now, there was clearly no actual residence, and although there are cases to show that there may be such a thing as constructive residence, I think that if all these facts had been proved before a jury, it would have been the duty of the presiding judge to tell them that in his judgment the residence was not made out.

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Decision reversed.

Attorney—For Appellant, *J. Elliott Fox.*

LORD RENDLESHAM, Appellant; HAWARD, Respondent.

Nov. 19.

Irish peers who have not been elected members of the House of Commons are not entitled to have their names upon the register of voters.

AT a Court held before the Revising Barrister appointed to revise the lists of voters for the Eastern Division of the county of *Suffolk*, an objection was duly made to the name of Baron *Frederick William Brook Rendlesham* (hereinafter called the appellant) being retained upon the list of voters for the said division of the said county.

The name of the appellant appeared upon the said list as follows:—

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Christian Name and Surname of each Voter.	Place of Abode.	Nature of Qualification.	Street, lane, &c., or name of the property, if known by any, &c.
Rendlesham, Frederick William Brook Baron.	*Rendlesham Hall.*	Freehold mansion and lands.	*Rendlesham Hall.*

The following facts were admitted :—

1. The appellant is and was during the qualifying period an Irish peer, and is not, nor ever has been, a representative peer or a member of Parliament.

2. The appellant was and is duly qualified to have his name retained in the said list, and to be registered as a voter in respect of the qualification described in the said list, unless disqualified by the fact of his being an Irish peer.

3. It was contended on behalf of the objector that the appellant was not entitled to have his name retained upon the said list by reason of his being an Irish peer.

4. It was contended on behalf of the appellant that a peer of Ireland elected a member of the House of Commons, and who had not declined to serve as such member, was entitled to vote at the election of knights of the shire, and that, as the appellant was in other respects qualified to vote, he was entitled to be registered in order to enable him to exercise such right of voting in the event of his being elected a member of the House of Commons, and not declining to serve as such member.

5. The Revising Barrister decided that the appellant being a peer, and not, during the qualifying period

nor at the time of registration, elected a member of the House of Commons, was not entitled to vote at the election of knights of the shire, and, consequently, not entitled to have his name retained upon the said list.

If the Court should be of opinion that the decision of the Revising Barrister was wrong, the register was to be amended by inserting the name of the appellant therein.

O'Malley, Q.C., for the appellant. The Revising Barrister ought not to have expunged the appellant's name from the register. No doubt, if the case were that of an English peer, it would be useless to contend against the authority of *Lord Beauchamp* v. *the Overseers of Madresfield* (*a*), since, according to that decision, an English peer is permanently incapacitated from voting for a member of the House of Commons. But an Irish peer is under no such incapacity. The only foundation for the alleged incapacity in his case rests on the resolutions of the House of Commons. *Heywood* (*b*) describes the passing of these resolutions, in 1801, in the terms now adopted in the Standing Orders of the House of Commons. "After the union of the kingdoms of *Great Britain* and *Ireland*, it became necessary to make some alterations in the Standing Orders of the House; and on the 30th *October*, 1801, some motions being made (*c*) respecting the voting and interfering of peers at elections, the debate was adjourned, and a committee appointed to report. On the 17th of *November*,

(*a*) 2 *Hopw. & Colt.* 41; *S. C.*, *R.*, 8 *C. P.* 245.

(*b*) *County Elections*, p. 317, 2nd edit.

(*c*) 57 *Com. Journ.* 5.

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1801 (*a*), the committee reported several resolutions, which afterwards (27th of *April*, 1802) (*b*) were adopted and made Standing Orders of the House, and as such have been repeated at the beginning of every subsequent session. 'Resolved that no peer of the realm, *except such peer of that part of the United Kingdom called* Ireland, *as shall for the time being be actually elected, and shall not have declined to serve* for any county, city, or borough of *Great Britain*, hath any right to *give his vote* in the election of any member to serve in Parliament.' 'Resolved, that it is a high infringement of the liberties and privileges of the Commons of the United Kingdom for any lord of Parliament, or other peer or prelate, *not being a peer of* Ireland *at the time elected, and not having declined to serve* for any county, city, or borough of *Great Britain, to concern himself in the election of members* to serve for the Commons in Parliament, except only any peer of *Ireland*, at such elections in *Great Britain* respectively, where such peer shall appear as a candidate, &c.'" It follows, from these resolutions, that an Irish peer elected a member of the House of Commons, and assenting to serve, has the right to vote at the election of its members as fully as any commoner. This at once distinguishes the position of the Irish peer from that of the English peer. While the English peer is under a permanent disability, the Irish peer may be fully qualified to exercise the right of voting when the time for voting arrives, the sole impediment to his doing so being at any moment susceptible of removal. Until the time for voting arrives it cannot be ascertained whether

(*a*) 57 *Com. Journ.* 34. (*b*) *Ib.* 376.

the impediment will exist; and meanwhile it is submitted that, if otherwise qualified, his name ought to be placed upon the register. This seems to have been the view taken by the Committee in the *Droitwich Petition* (Lord *Southwell's* case) (*a*), where the resolution come to was as follows: "that they (the Committee) were of opinion that there was no statute under which the barrister could have *excluded from the list* the name of Lord *Southwell*, but feeling themselves called upon to enforce the Standing Order of the House against the interference of peers in elections, they overruled the objection of the counsel of the petitioner."

[COLERIDGE, C. J. The 4th article of the Act of Union (39 & 40 *Geo.* 3, c. 67,) contains some strong expressions in reference to Irish peers. The terms there employed seem to show that, if an Irish peer chooses to serve as a member of the House of Commons, his *status* is reduced, while he continues to serve, from the *status* of a peer to that of a commoner. In accordance with that, the resolutions of the House of Commons against the interference of peers in the election of their members, are framed so as to except those who, by the Act of Union, are stript of their rights of peerage.]

It will be observed that that statute only deals with the right of an Irish peer to be elected as a member of the House of Commons. It does not deal with the question of an Irish peer's right of voting at the election of its members. Prior to the Act of Union, an

(*a*) *Knapp & Omb.* 65—69.

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Irish peer enjoyed the right of voting for members of the House of Commons as fully as any commoner. The statute does not take away that right. The resolutions of the House of Commons are the only hindrance to the enjoyment of it, and they are subject to the authority of the House, and might be at any time altered or rescinded by it.

[KEATING, J. Is there any instance of an Irish peer sitting in the House of Commons prior to the Act of Union ?]

It is believed that many might be produced.

[BRETT, J. By the Act of Union, the Irish peers are associated with the Upper House. Then there is a provision in the Act to the effect that, though thus associated, they may renounce their privileges and reduce themselves to the *status* of commoners, in which case they as commoners have certain rights, among others the right of voting for members of the House of Commons.]

[COLERIDGE, C.J. A Scotch peer cannot be elected a member of the House of Commons. Does not the ability of the Irish peer to be elected there depend upon the Act of Union (*a*) ?]

(*a*) In *May's Parliamentary Practice*, 7th ed. p. 33, it is said, "English peers are ineligible to the House of Commons as having a seat in the Upper House ; and Scotch peers *as being represented there*, by virtue of the Act of Union." And in a note *May* says, "The provisions of the law are sufficiently distinct upon that point, and there are numerous precedents of new writs issued in the room of members becoming peers of Scotland," and he cites several

The question for decision really turns on the 6 *Vict.* c. 18, s. 40. It is this:—Is the appellant incapacitated by "*any law or statute*" from voting for members of the House of Commons? If he is, the 6 *Vict.* c. 18, s. 40, no doubt enables the Revising Barrister to expunge his name from the list of voters.

instances that have occurred *since* the Act for the Union of England and Scotland (5 & 6 *Anne*, c. 8,) came into operation.

The right of a Scotch peer, *prior* to the 5 & 6 *Anne*, to sit in the English House of Commons, was questioned in the case of Lord *Falkland*, member for *Hertfordshire* (*February*, 1621), 1 *Com. Journ.* 512, and that of an Irish peer, in the case of Lord *Vaughan*, member for *Carmarthenshire* (*November*, 1621), 1 *Com. Journ.* 641. *Douglas' Peerage of Scotland*, vol. i. p. 568, thus mentions the discussion in reference to Lord *Falkland*. "At the meeting of the Parliament of *England*, *February*, 1620–21, an objection was taken to his (Lord *Falkland's*) return as member for *Hertfordshire*, on account of his having been created a peer of *Scotland* since his election; a discussion ensued: it was contended that no notice should be taken of his honour in *Scotland*, which was a distinct kingdom, and he being only a commoner in *England*. No decision was given."

The objection, however, does not seem to have been further insisted on. In the discussion of Lord *Vaughan's* case, *Coke* is reported to have said: "If Sir *Jo. Vaughan*, made Viscount by the seal of *Ireland*, be a baron there, none here: he is to be sued here as a knight, and to be tried by twelve men, not *per pares*." 1 *Com. Journ.* 641: and he cites the case of Lord *Falkland* as parallel. In the year 1640, we find the second Lord *Falkland* elected for *Newport*, in the *Isle of Wight*, and sitting in that and the succeeding parliament.

As instances of Irish peers, who shortly before the Act of Union with *Ireland* (39 & 40 *Geo.* 3, c. 67), were sitting for *English* or *Scotch* constituencies, and who on being created English peers vacated their seats, the following may be cited.

John, Lord *Delaval* (created an English peer 21st *August*, 1786), vacated his seat for *Berwickshire*, 42 *Com. Journ.* 3.

John, Earl of *Upper Ossory* (created an English peer 9th *August*, 1794), vacated his seat for *Bedfordshire*, 50 *Com. Journ.* 3.

William, Lord *Auckland* (created an English peer, 22nd *May*, 1793), vacated his seat for *Heytesbury*, 48 *Com. Journ.* 794.

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But it is submitted that he is not. If he be under any incapacity at all, it is not one created by "law" or by "statute," but solely by the effect of the resolutions of the House of Commons. The disqualification of infancy is an incapacity created by "law," and that distinguishes the case of *Powell* v. *Bradley* (*a*), where the Court appear to have thought that, in the case of infancy, the incapacity must have ceased at latest upon the day of the revision in order to justify the registration of the voter. And the same remark applies to such other instances of incapacity as might be cited, *e.g.*, the custom-house officer, and the policeman, both of which are incapacities which are created by "statute."

[KEATING, J., referred to the language of 1 *Hen.* 5, c. 1, as seeming to show that no one higher than a knight could be a "chooser."]

Although it is too late to argue that an English peer is not by law incapacitated, it is submitted, for the reasons already given, that the case of an Irish peer stands upon a different footing.

G. Browne, for the respondent, was not called upon.

COLERIDGE, C.J. I am of opinion that the decision of the Revising Barrister should be affirmed. The case of *Lord Beauchamp* v. *the Overseers of Madresfield* (*b*), has already decided in the case of English peers that by immemorial custom they are not entitled to vote at the election of members of the House of Commons, and that

(*a*) *Hopw. & Ph.* 159, 162; *S. C.*, *S. C.*, 18 *C. B., N. S.* 65, 69.

(*b*) 2 *Hopw. & Colt.* 41; *S. C.*, *L. R.*, 8 *C. P.* 245.

they have no right to have their names inserted upon the register of voters. The question now before us is whether an Irish peer, who is neither a representative peer, nor a member of the House of Commons, is subject to a similar disability. I am of opinion that he is. The Act of Union (39 & 40 *Geo.* 3, c. 67,) enacts, in distinct terms, that there shall be one Parliament for the United Kingdom; and it proceeds to ascertain the mode in which the Irish peers are to sit there, viz., by representation. The fourth article contains a special provision. By it any person holding an Irish peerage, and who has not been previously elected to sit in the House of Lords, is allowed, if he think fit, to be elected and to serve in the House of Commons; but, so long as he does so, "he shall not be entitled to the privilege of peerage, nor be capable of being elected to serve as a peer on the part of *Ireland*, or of voting at any such election; and he shall be liable to be sued, indicted, proceeded against, and tried as a commoner." So that the effect on one who avails himself of the above provision is to reduce his *status* from that of a peer to the *status* of a commoner. But for the provision referred to, an Irish peer would be in the same position as a Scotch peer, and he would be equally disentitled to sit in the House of Commons. And, as regards the right of voting at the election of its members, I think that, so long as he retains the privileges of a peer, he is disentitled for similar reasons.

It has been argued, however, that although an Irish peer is under a disability as to voting, it is one that may be removed by his being elected to serve in the House of Commons, and that in view of this possibility his name ought to be placed upon the register. Reference has

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been made to the resolution of the House of Commons (*a*), "that no peer of this realm, except such peer of that part of the United Kindom called *Ireland* as shall for the time being be actually elected, and shall not have declined to serve for any county, city, or borough of *Great Britain*, hath any right to give his vote in the election of any member to serve in Parliament." Whether that resolution be simply declaratory of the law, I express no opinion. It may be that it is so, and that it is only in that sense that it is entitled to our respect. But the question we have to decide here is whether an Irish peer, who has neither served nor been elected a member of the House of Commons, is entitled to have his name upon the register. I am of opinion that he is not. The 6 *Vict.* c. 18, s. 40, enacts in terms that "in case it shall be proved that such person was *then* incapacitated by any law or statute from voting in the election of members to serve in Parliament," the Revising Barrister "shall expunge the name of every such person from the said lists." The Court in the case of *Powell* v. *Bradley* (*b*) have put an interpretation on the word "then," holding that it refers to the day of the registration, and that the decision of the Revising Barrister is substituted for what formerly took place in the polling booths. Here the appellant was by law incapacitated equally on the 31st of *July* and on the day of the registration, and not the less so because within the twelve months subsequent thereto it was possible that something might occur which would have the effect of removing this incapacity. If the argument addressed to us on this point were correct, it would apply equally

(*a*) 57 *Com. Journ.* 34, 376.
(*b*) *Hopw. & Ph.* 163 ; *S. C.*, 18 *C. B. N. S.* 70.

in the case of infants, and in many other cases of removable incapacity, in all of which it might be urged that they ought upon similar grounds to be placed on the register. I think that the decision of the Revising Barrister was right, and that it should be affirmed.

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KEATING, J.; BRETT, J.; and GROVE, J.; concurred.

Decision affirmed.

Attorneys—For Appellant, *J. R. Wood.*
For Respondent, *Aldrich* and *Thorne.*

SHERWIN, Appellant; WHYMAN, Respondent.

Nov. 19.

Where, upon the consolidation of several appeals, the Revising Barrister names one of the persons interested, and consenting, on behalf of himself and the others to prosecute the appeal, the person so named is the only one who need appear by the endorsement of the case as the appellant.

THE case was as follows:—

At the Court held for the revision of the list of voters for the parish of *St. Alkmund, Derby,* in the southern division of the county of *Derby,* before me, *John Stratford Dugdale,* Esquire, barrister-at-law, duly appointed to revise the list of voters for the said southern division of the county of *Derby,* in which the said parish of *St. Alkmund, Derby,* is comprised, *Robert Whyman,* of *London Street, Litchurch,* attended the said Court on this day (when I decided that *Samuel Sherwin,* of *Cherry Street, Derby,* was not entitled to have his name inserted in the register of voters for the said parish), and

The qualification of a person on the list of county voters was stated in the third column as "rent-charge on freehold house," and (upon the ground that this did not necessarily import a freehold rent-charge), the Revising Barrister held it to be an insufficient description, which he had no power to amend. Held, that the description as stated was sufficient; but that, if there were any insufficiency for the purpose of identification, the Revising Barrister should have inquired further, and not have held it insufficient as matter of law.

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before the rising of the said Court delivered to me a notice in writing that he is desirous to appeal against my decision. Wherefore, I, the said *John Stratford Dugdale*, do state the following case for the opinion of Her Majesty's Court of Common Pleas at *Westminster*:—

1. The respondent duly objected to the name of the appellant being retained upon the list of voters for the parish of *St. Alkmund, Derby*, and grounded his objection on the third column of the register, in respect of the nature of the appellant's interest in the qualifying property.

2. The entry on the list of voters was as follows :—

2410	*Sherwin, Samuel*	*Cherry Street, Derby*	Rent charge on Freehold house.	*Parker Street, W. B. Sherwin,* owner.

3. It was contended, on behalf of the objector, that the qualification of the said appellant, as stated in the said list of voters, was insufficient in law to entitle him to vote, on the ground that the rent-charge was not stated in the third column to be a "freehold rent-charge."

4. It was contended, on behalf of the appellant, that the qualification as stated was sufficient; that a freehold rent-charge was the only rent-charge which could confer a vote; and that, therefore, the omission of the word "freehold" was immaterial, and at most a misnomer or inaccurate description; and further, that I had power to amend by adding the word "freehold," if amendment were necessary.

5. I was of opinion that, under 8 *Hen.* 6, c. 7, a

freehold tenure was of the very essence of this qualification, and that this did not appear upon the list either by absolute statement or by necessary implication; from this it followed that, in my opinion, the case was not one of misnomer nor of inaccurate description within sect. 101 of the Registration Act, 1843, and that there was no power to amend under sect. 40 of the same Act.

I consequently expunged the name from the list of voters.

6. The names of fourteen other persons contained in a schedule annexed to this case, and all in like manner duly objected to by the said respondent, *Robert Whyman*, were expunged upon the same grounds from the lists of voters for the several parishes of *St. Alkmund*, *Derby*, *Litchurch* and *Littleover* in the said southern division of the county of *Derby*.

Their several cases depended upon the same points of law as this case, and ought to be consolidated therewith.

If the Court should be of opinion that my decision was wrong, then the names of the appellant and the said several other persons are to be restored to the said several lists of voters, with or without amendment, as the Court shall think fit.

John S. Dugdale,
Revising Barrister for *South Derbyshire*,
October 24*th*, 1873.

At the bottom of the case there appeared the following declarations:—

"I for myself and on behalf of all the other persons who are interested as appellants in this matter, and

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whose names are written in the schedule hereunder annexed, do appeal against this decision, and agree to prosecute this appeal.

"*Samuel Sherwin.*

"I agree to appear and answer this consolidated appeal.

"*Robert Whyman.*"

Then followed the schedule containing the names, places of abode, &c., of the fourteen other persons, and at the end of the schedule there was a memorandum by the Revising Barrister:—

"This is the schedule referred to in the foregoing case.

"*John S. Dugdale.*"

The case was indorsed as follows:—"County of *Derby*, Southern Division; Polling District, *Derby;* Parish (or Township) of *St. Alkmund, Derby; Samuel Sherwin*, of *Cherry Street, Derby*, appellant; *Robert Whyman*, of *London Street, Litchurch*, respondent.

"(Signed) *John S. Dugdale,*

"Revising Barrister.

"Dated *October 24th*, 1873."

Giffard, Q.C. (*Gorst* with him), for the respondent. There is a preliminary objection to the hearing of this appeal, viz., that the statutory requirements of 6 *Vict.* c. 18, which are imposed seemingly for the purpose of ascertaining the parties to the appeal, have not been complied with. There is no indorsement on the back of the case of the names of the several appellants, nor is there any finding in the body of the case that any other persons besides *Samuel Sherwin* have in fact appealed.

It is indispensable to the jurisdiction of the Court that the parties to the appeal should be properly ascertained. No doubt if there were a distinct finding in the body of the case, that the fourteen other persons, whose names were expunged, *thereupon appealed*, the objection as to the names of all the appellants not being indorsed on the back would then be reduced to one of form. But in the absence of any such finding, it is an objection of substance. It is of importance upon the question of costs. The respondent is entitled to have distinct information as to who the parties to the appeal are. Enough should at least appear from the case to show that each of the persons, whom it is said by the other side have been made parties, has done that which makes him responsible for the costs of the appeal. No doubt, at the foot of the case, there is a declaration of appeal by *Sherwin* on behalf of himself and the other fourteen persons, which follows the statutory form. That, however, is merely a notice by *Sherwin* himself, and in the absence of any authentication of it by the Revising Barrister, it cannot be inferred from that alone that the fourteen other persons have constituted themselves parties to the appeal. *Wanklyn* v. *Woollett* (*a*), and *Burton* v. *Brooks* (*b*), both point to the conclusion that if the indorsements on the case be not made in accordance with the statute, it is fatal to the appeal. The indorsements are required by s. 42 in the case of single appeals; but by s. 45 the machinery of s. 42 is made to apply also to consolidated appeals, so that we must import that machinery into s. 44. Section 45 expressly enacts that "in and with regard to every such consoli-

(*a*) 1 *Lutw.* 597; *S. C.*, 4 *C. B.* 86.
(*b*) 2 *Lutw.* 197; *S. C.*, 11 *C. B.* 41.

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dated appeal, the like proceeding shall be had and taken, and the like rules and regulations shall apply as in the case of any other appeal under this Act." It is not contended that every name in the Schedule need appear on the back of the case, but that something should there appear, which, by reference or otherwise, incorporates all the appellants as parties, and indicates a consolidated appeal.

COLERIDGE, C.J. I think that we should proceed to the hearing of this appeal, and that the objection founded on the provisions of 6 Vict., c. 18, cannot prevail. The 42nd section, by which it is directed that the Revising Barrister shall indorse upon the case, "the Christian name and surname and place of abode of the appellant and of the respondent," is the section which regulates the case of single appeals, while the 44th section is that which applies to consolidated appeals; but the 45th section further enacts that, "in and with regard to every such consolidated appeal, the like proceeding shall be had and taken, and the like rules and regulations shall apply as in the case of any other appeal under this Act." Now, if it did not substantially appear that there had been a compliance with the requirements of the Act to which I have referred, I should agree that there might be some ground for Mr. *Giffard's* objection. But here I think that that does substantially appear. The sixth paragraph of the case states, "that the names of fourteen other persons contained in a Schedule annexed to this case," were expunged upon the same grounds, and that "their several cases depended upon the same

points of law as this case, and ought to be consolidated therewith." I think that that is a sufficient statement of the pendency, upon the point of law stated, of several appeals which the Revising Barrister considered ought to be consolidated. Further, it appears that *Samuel Sherwin* did in the form prescribed by the statute undertake to be appellant, and *Robert Whyman* to be respondent, in the several cases; and, although the declaration thus signed by them is subsequent to the signature of the Revising Barrister appended to the case, it precedes his indorsement upon the back of it, which must be taken as an authentication by him of the several appeals and of their consolidation. We have been pressed with the case of *Wanklyn* v. *Woollett* (*a*) as being an authority in point, but it is not so at all. The Court was there asked to entertain an appeal, when a condition precedent to its jurisdiction, imposed by sec. 62, had not been complied with, viz., that the signature of the Revising Barrister to the indorsement of the appeal had not been obtained in time. That case is quite different from the present, and cannot govern it.

KEATING, J., concurred.

BRETT, J. The 42nd section, read by itself, appears to me a directory enactment with reference to single appeals, the 44th a directory enactment with reference to consolidated appeals. But, by sec. 62, part of the 42nd section is made a condition precedent. Sec. 42 enacts that "the said barrister shall then indorse upon every such statement the name of the county and polling district, or city and borough, and of the parish or

(*a*) 1 *Lutw.* 597; *S. C.* 4 *C. B.* 86.

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township to which the same shall relate, and also the christian name and surname and place of abode of the appellant, and of the respondent in the matter of the said appeal, and shall *sign* and date such indorsement." Looking merely to sec. 42, I should have thought that provision was simply directory. But then comes sec. 62, providing for the transmission within the first four days of Michaelmas Term of the statement "*so signed* by the said Revising Barrister *as aforesaid*," and thus making a part of the 42nd section a condition precedent. This was all that *Wanklyn* v. *Woollett* (*a*) decided. Lord *Truro* refers both to the 42nd section and to the 62nd, and relies on the terms of the 62nd; and, inasmuch as the indorsement was not signed by the Revising Barrister, he held that they had no power to entertain the appeal. And *Burton* v. *Brooks* (*b*) is to a similar effect. Passing then to sec. 44, it enacts, that "it shall be lawful for the said barrister to *name any person interested*, and consenting, for and on behalf of himself and all other persons in like manner interested in such appeals, to be *the appellant* or respondent respectively in such consolidated appeal, and to prosecute or answer the said appeal in like manner as any appellant or respondent might in his own case under the provisions of this Act." I agree that the provisions of sec. 42 as to indorsement must be incorporated in sec. 44, so that the Revising Barrister's signature to the indorsement is necessary in consolidated as well as in single appeals. Incorporating, therefore, this part of sec. 42, we have it that the indorsement is

(*a*) 1 *Lutw.* 597; *S. C.*, 4 *C. B.* 86.
(*b*) 2 *Lutw.* 197; *S. C.*, 11 *C. B.* 41.

to contain the name of the appellant, which, in the case of consolidated appeals, I construe to mean *the appellant named by the Revising Barrister*. Now, this *Sherwin* undoubtedly was, if we assume that it sufficiently appears from the case that there were several appellants (of whom *Sherwin* was one), and a consolidated appeal. I think that this does sufficiently appear from the case, and that the Revising Barrister has properly appointed *Sherwin* to represent the other persons in the appeals which he has consolidated, and that the case is, therefore, correctly indorsed. Mr. *Giffard* need be under no apprehension on the subject of costs, for the 45th section imposes the liability upon all.

GROVE, J., concurred.

The argument then proceeded upon the merits.

The Attorney General (*J. Edwards* with him) for the appellant. The description is sufficient as it stands, and if not the Revising Barrister had ample power to amend it. The Court will surely assume that the word "rent-charge," when used to describe the nature of a qualification, must refer to something which does, rather than to something which does not, confer qualification. If that be admitted, it follows at once that the word "rent-charge" refers to a "freehold rent-charge," and to a freehold rent-charge only, since it is established by authority that the only description of rent-charge which can give qualification is a freehold rent-charge. *Warburton* v. *The Overseers of Denton (a)*. The 6 Vict.

(a) 1 *Hopw. & Colt.* 432; *S. C. L. R.* 6, *C. P.* 267.

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c. 18, illustrates this in the language of Schedule A, Nos. 3 & 6. There the subject-matter spoken of as a "rent-charge" is confessedly such a rent-charge as gives qualification, or, in other words, a freehold rent-charge, but the only word used to describe it is "rent-charge." The part of the schedule where that occurs is under the fourth column, "or if the qualification consist of a rent-charge, &c." In *Rogers on Elections*, 11th ed., p. 142, the case of *Longfield* v. *O'Connor*, *Exch. Ch. Ireland*, *2nd Dec.*, 1864, is cited as deciding that "the statement of a qualification as '£20 rent-charge' is sufficient." In *West* v. *Robson* (*a*) and *Webster* v. *The Overseers of Ashton-under-Lyne*, *Orme's Case* (*b*), and *Hadfield's Case* (*c*), the description in the second and third columns was "rent-charge," without stating it to be freehold; and no objection was ever taken to the sufficiency of that description. *Howitt* v. *Stephens* (*d*), and *Birks* v. *Allison* (*e*), are strongly in point for the appellant. In the former case, the qualification was stated as "£50 occupier," and it was held that it was sufficient in law, and if not sufficiently described for the purpose of being identified, the description ought to have been amended by the Revising Barrister. In the latter case, the qualification was stated as "tenant," and the court intimated that it was probably as it stood a sufficient description of a qualification as occupying tenant at a yearly rent of not less than £50, but that at all events the Revising Barrister was justified in amend-

(*a*) *K. & G.* 141; *S. C.* 3 *C. B. N. S.* 422.
(*b*) 2 *Hopw. & Colt.* 60; *S. C. L. R.*, 8 *C. P.* 281.
(*c*) 2 *Hopw. & Colt.* 89; *S. C. L. R.* 8, *C. P.* 306.
(*d*) *K. & G.* 183; *S. C.* 5 *C. B N. S.* 30.
(*e*) *K. & G.*, 507; *S. C.* 13 *C. B. N. S.* 12.

ing the statement as he had done, by inserting the words "farm as occupying tenant." On the other hand, *Nicholls* v. *Bulwer* (*a*) is in no respect an adverse authority. There the qualification described was a freehold rent-charge, but the qualification proved was freehold land, so that the Revising Barrister could not have amended the description without altering the qualification.

Giffard, Q.C. (*Gorst* with him), for the respondent. The Revising Barrister was right in his decision, and in declining to amend, since he evidently considered that the qualification was not so denominated as to be commonly understood. This, it is submitted, must be assumed as at the foundation of his decision; and the court will not sit in appeal from the Revising Barrister upon a question of fact. The forms in Schedule H of 2 *Will.* 4, c. 45, may, notwithstanding their repeal, be usefully referred to as illustrating what sort of a description is necessary, since the forms in 6 *Vict.*, c. 18 are not filled up with any examples. Now, in Schedule H, No. 2 of 2 *Will.* 4, c. 45, under the heading "Nature of qualification," we find "*Freehold* House (*or* Warehouse, Stable, Land, Field, Annuities, Rent-charge, &c.); so that freehold is there the governing word. It is true that the qualification created by the *Chandos clause* does not appear to be there referred to except generally under the &c.; but that, it is submitted, does not affect the argument that, where the qualification is freehold, its freehold character must be expressly stated. Here the qualification as stated in the list is "insufficient

(*a*) 1 *Hopw. & Colt.* 472; *S. C. L. R.* 6 *C. P.* 231.

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in law," and, if so, the Revising Barrister was bound to expunge the name, and had no power of amendment.

[COLERIDGE, C. J. Does not "insufficiency in law" apply rather to the statement of a bad qualification, than to the insufficient statement of a good one?]

Rent-charge of itself is no qualification, and where no qualification is stated, the Revising Barrister cannot amend the description so as to make one. He cannot, it is submitted, amend where the description is not such as to be commonly understood. On that ground the case of *Birks* v. *Allison* (*a*) is distinguishable; for in that case there was an express finding by the Revising Barrister, that the nature and description of the qualification were sufficiently described for the purpose of being identified.

[GROVE, J. Is there anything to limit the power of amendment under sec. 40 to cases where the thing inaccurately described is "so denominated" "as to be commonly understood" within sec. 101. In those cases the power of amendment does not seem to be required.]

[COLERIDGE, C. J. You read sec. 101 as saying that "misnomer or inaccurate description, &c.," *shall* abridge the operation of the Act where the subject matter described is *not* so denominated as to be commonly understood.]

(*a*) *K. & G.* 507; *S. C.* 13 *C. B. N. S.* 12.

Where the description is inaccurate, but such as to be commonly understood, the Revising Barrister should amend, as the law casts upon him the duty of making the lists precise and accurate. But he cannot amend so as to make a qualification, where none has been stated by the original description. The word rent-charge is just as consistent with a chattel interest, as with an interest of freehold. Could it be contended that the word "house" was any description of a freehold house, and that a county qualification could be acquired under that description?

[*The Attorney General* referred to the case of *Ford* v. *Boon* (*a*).]

That was the case of a borough vote. The word "house" was there held to point, as it naturally did, to the occupation franchise under the Reform Act, rather than to a freehold tenement in respect of which the right of voting was reserved by that statute.

The Attorney General was not heard in reply.

COLERIDGE, C. J. I am of opinion that the decision of the Revising Barrister must be reversed. His intention in stating the case appears to me to have been to leave two questions for our decision: first, whether the qualification was sufficiently described; secondly, if it was not, whether he had power to amend. The Revising Barrister has decided both questions in the negative; holding, first, that the description of the qualification was

(*a*) 1 *Hopw. & Colt.* 668; *S. C. L. R.* 7 *C. P.* 150.

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insufficient, and, secondly, that the insufficiency was such as to deprive him of the power to amend. I think that upon both points he decided wrongly. From the cases of *Howitt* v. *Stevens* (*a*) and *Birks* v. *Allison* (*b*), I should conclude that this description was well enough as it stood. In *Birks* v. *Allison* (*b*) one, if not all, of the Judges, thought that the description there given was sufficient without amendment. Where the description is one which may describe something which constitutes a qualification, and which either does so, or describes nothing at all, I think we ought not to be astute so to construe the words as to give them no effect. But, secondly, if the Revising Barrister meant to hold, as apparently he did, that, because the freehold nature of the rent-charge did not appear, either by absolute statement or by necessary implication, he could, therefore, have no power to amend, I think that he clearly came to a conclusion which was erroneous in law. On both points I think he was wrong. I think that no amendment was necessary, but, if necessary, it ought to have been made.

The decision of the Court will, therefore, be for the appellant.

KEATING, J. I agree, and am of opinion that the Revising Barrister was wrong on both points. There is but one description of rent-charge which can confer qualification—*viz.*, a freehold rent-charge; and why we should read the word rent-charge as meaning something which would not confer a qualification, I am at a loss to imagine. The reasonable construction surely is, that

(*a*) *K.* & *G.* 183; *S C.* 5 *C. B. N. S.* 30.

(*b*) *K.* & *G.* 507; *S. C.* 13 *C. B. N. S.* 12.

such a rent-charge is intended as will constitute a qualification; in other words, a freehold rent-charge. The description is, therefore, sufficient as it stands; but if it were not, it was clearly the duty of the Revising Barrister to make it sufficient by inserting the word freehold, and such an alteration was undoubtedly within his powers. I cannot accede to Mr. Giffard's suggestion that the Revising Barrister meant to conclude us by finding as a fact what nobody reading it would understand, that the description was not such as to be commonly understood.

BRETT, J. I am of the same opinion. That the description of the qualification in the third column need never be strictly accurate is clear. It is sufficient if, though not described with strict accuracy, it be so described that it can be identified. Where the description is equally applicable to two different qualifications, I should feel the same doubt that I entertained in *Townshend* v. *the Overseers of St. Marylebone* (*a*) and *Ford* v. *Boon* (*b*). It is difficult in such cases to say that the qualification is so described as to be capable of identification. But the majority of the Court in the former case, and the whole of it in the latter, gave their decision, that a description, the language of which was such as to be capable of being applied to either of two qualifications, might nevertheless be applied to one of them, and, if necessary, amended for that purpose. I think that those cases are stronger than the present. Here the description, though, as it may be but the

(*a*) *Hopw. & Colt.* 606; *S. C. L. R.* 7 *C. P.* 143.

(*b*) *Hopw. & Colt.* 668; *S. C. L. R.* 7 *C. P.* 150.

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description of a chattel rent-charge, it is not strictly accurate, yet, if it describes any qualification at all, it must describe a freehold rent-charge. I incline, therefore, to think that the description was sufficient for identification. But the cases of *Howitt* v. *Stevens* (*a*) and *Birks* v. *Allison* (*b*), which followed it and carried out its principle, are absolute authorities upon the point, that the Revising Barrister might here have amended. The Revising Barrister "was of opinion that under 8 *Hen.* 6, c. 7, a freehold tenure was of the very essence of this qualification." So far he is correct. "And that this did not appear on the face of the list, either by absolute statement or necessary implication;" which is probably correct also, since the words might describe a chattel rent-charge. But from this, he says, it follows that the case is not one of misnomer or inaccurate description, and that he has no power to amend. I think that the conclusion he has deduced is erroneous in law. The Revising Barrister should have satisfied himself whether the description of the qualification was sufficient for the purpose of identification, and, if necessary, he should have proceeded to take evidence. But this he declined to do. He stopped short, and inquired no further, upon the ground which he has alleged—*viz.*, that it did not appear by absolute statement, or necessary implication, that the rent-charge was freehold. In this I think he was clearly wrong.

GROVE, J. It being requisite that the nature of the qualification should be stated, we have to see what

(*a*) *K.* & *G.* 183; *S. C.* 5 *C. B. N. S.* 30.

(*b*) *K.* & *G.* 507; 13 *C. B. N. S.* 12.

was the object in view in making that requirement. I think that the object of the Legislature was that the description should be such as to distinguish the qualification claimed from the other qualifications which exist; as, for instance, whether it be a freehold or leasehold qualification, so as to enable it to be known upon what ground the franchise is claimed. Now, there is but one description of rent-charge that can give qualification. The appellant does not claim here as a freeholder, or leaseholder, but as having a rent-charge qualification, and I think that he has given a description which could not be misleading. I cannot agree with the Revising Barrister that the description need be expressed in as precise and logical language as if it were a definition. Then, as to the power of amendment. I do not agree with the Revising Barrister that it is limited to cases of misnomer or inaccurate description, within sect. 101, which applies to cases where the description is such as to be commonly understood. The power of amendment depends entirely on sect. 40, the language of which differs from that of the 101st section. It is true that under sect. 40 the Revising Barrister cannot alter the qualification, but he can supply a deficiency in its description. And here the proposed amendment would clearly not alter the qualification, for it still continues to be a rent-charge. Therefore, though I agree that no amendment was necessary, I think, if it were, that it ought to have been made.

Decision Reversed.

Attorneys—For Appellant, *T. C. Greenfield.*
For Respondent, *S. B. Somerville.*

DURANT, Appellant; WITHERS, Respondent.

Nov. 18.

A claimed the borough franchise for a house, in respect of which before the qualifying year, he had agreed with his landlord that the poor-rates should be paid by the landlord and included in the rent; and the landlord had agreed with the overseers to pay a composition on the poor-rates. In the rate immediately preceding the qualifying year the amount of the composition was carried out under the heading "Amount of rate assessed upon the owner instead of the occupier by virtue of the statute or statutes in that behalf," but no statute existed which authorized such an assessment. The amount assessed was paid by the landlord. Subsequently, the absence of statutory authority for the assessment having been discovered, the landlord, in September of the qualifying year, of his own accord, paid to the overseers the difference between the full amount of rate and the composition previously paid: Held that A could not be deemed, in respect of this rate, to have paid an equal amount in the pound to that payable by other ordinary occupiers within sec. 3, subsec. 4, of the Representation of the People Act, 1867.

AT a Court holden before the Revising Barrister appointed to revise the lists of voters for the borough of *New Windsor*, the appellant duly objected to the name of the respondent being retained in the list of persons entitled in respect of property occupied in the parish of *New Windsor* at the election of a member for the borough of *New Windsor*.

The name of the respondent appeared in the list as follows:—

Withers, Henry.	Leworth Place.	House.	Leworth Place.

The following facts were established by the evidence.

An agreement had been entered into previously to the qualifying year between the respondent and the owner of the house, that the poor-rates in respect of the house should be paid by the owner, and included in the rent paid by the respondent. Previously to the qualifying year an agreement had also been entered into between the owner and the overseers of the parish (as stated by the overseers under 59 *Geo.* 3, c. 12), by which the owner was to pay a composition in respect of the poor-rates upon the house occupied by the respondent.

In the poor-rate made on the 2nd *May*, 1872, the name of the owner and occupier duly appeared.

An extract of the poor-rate was set out, stating in the appropriate columns the names of the occupier and owner, the gross estimated rental (£12 10*s.*), and the rateable value (£10). A blank was left under the heading "Rate at 8*d.* in the pound," and under the respective headings "Amount of rates assessed upon and payable by the owner, instead of the occupier, by virtue of the statute or statutes in that behalf," and "Total amount to be collected," the sum of 4*s.* 8*d.* was inserted.

Under the said last-mentioned agreement, the owner had paid to the overseers in respect of the said rate of the 2nd of *May*, 1872, the sum of 4*s.* 8*d.*, being the full amount of the composition in respect of the rate upon the said house. After this had been done, it was considered that the said payment was insufficient, inasmuch as no such agreement for composition could legally have been entered into, it being provided by sec. 23 of the said statute, 59 *Geo.* 3, c. 12, that nothing in that Act should extend to give power or authority to assess the owner, not being the occupier of any house, apartment, or dwelling, in any borough in which the right of voting for the election of members to serve in Parliament shall depend upon the assessment of the voter to the poor-rates, &c. The owner paid in the month of *September*, 1872, the sum of 2*s.*, that sum being, together with the 4*s.* 8*d.* previously paid by him as a composition sufficient to make up an equal amount in the pound to that payable by other ordinary occupiers in respect of the said rate made on the 2nd of *May*,

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1872. The payment of the said sum of 2*s.* was mad by the owner of his own accord.

It was contended, on behalf of the respondent, tha under the above circumstances, the provision in the 4th sub-section of sect. 3 of 30 *&* 31 *Vict.* 102, was complied with.

It was contended by the objector that the said provision in the said 4th sub-section had not been complied with, and reliance was placed upon sect. 30 of 2 *Will.* 4, c. 45, which provides for occupiers claiming to be rated to the relief of the poor in respect of the premises occupied by them, and further reliance was placed upon sect. 49 of 30 *&* 31 *Vict.* c. 102.

The names of five other persons, whose names and qualifications were set out in the schedule, were objected to under similar circumstances.

The Revising Barrister was of opinion that under the circumstances above stated there had been a sufficient payment of the rate of the 2nd of *May*, 1872, to entitle the said respondent to vote; that there was nothing to satisfy him the said two sums had been paid by the owner corruptly or not *bonâ-fide*, and that there was nothing to satisfy him that anything had been done contrary to the provisions of sect. 49 of 30 *&* 31 *Vict.*, c. 102, and he retained the name of the respondent and of the five other persons on the said list.

If the Court should be of opinion that the decision was wrong, the list of voters was to be amended by expunging the name of the respondent and the said other persons from the list:—

Kingdon, Q.C., for the appellant. The decision of the

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Revising Barrister was wrong. The respondent has not paid an *equal amount in the pound* to that payable by other ordinary occupiers in respect of the poor-rate made in *May*, 1872, so as to satisfy the 4th sub-sect. of sect. 3 of the Representation of the People Act, 1867. True, a sum of money equal to the full amount of that rate has been paid by the owner of the house; but the sum paid by the owner of the house in the first instance was only a composition of the rate, and although a sum, equal to the difference between the composition and the full rate, was also subsequently paid, and, as the case finds, paid by the owner of his own accord, the latter payment could not be deemed a payment of *rate*, for it was a payment in respect of which there was no one liable. The remedy for this, as regards the franchise, was in the respondent's own hands. He should have tendered the full amount of the rate, and claimed to be rated, but not having done so he cannot be deemed either to have been rated, or to have paid the full rate. The Poor Rate Assessment and Collection Act, 1869, has no application, for this case is not brought within its provisions: *Cross* v. *Alsop* (*a*). Even if the respondent could be deemed to have been rated, there was no rate on any one to the full amount, so that an equal amount of *rate* with that payable by other ordinary occupiers has unquestionably never been paid.

Gorst, for the respondent. There is no question of rating raised by this case. The question depends entirely

(*a*) 1 *Hopw. & Colt.* 444; *S. C. L. R.* 6 *C. P.* 315.

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on the 4th sub-sect. of sec. 3 of the Representation of the People Act, 1867, and the 3rd sub-section has no bearing on it. The rate under discussion was not made during the qualifying year, but in the *May* preceding it. The respondent is entitled to make any assumption of facts which would confine the arguments to the question which the Revising Barrister intended to raise, *viz.* as to the payment of the rate. It may, therefore, be assumed that the respondent has claimed to be rated. There is no finding in the case that he has not, or that he was not rated. The respondent has done all that he could to satisfy the 4th sub-sect. Through a mistake of the overseers, for which he is not responsible, the amount of the payment was in the first instance insufficient, but the full amount of the rate was subsequently paid by the landlord, and paid in due time, and payment by the landlord, under an agreement with the respondent, was payment by the respondent.

KEATING, J. I am of opinion that the decision of the Revising Barrister must be reversed. It is plain that there has been no such payment of poor-rate by the respondent as will satisfy the 4th sub-section of sec. 3 of the Representation of the People Act, 1867. The first payment was only a composition. It is true that the landlord afterwards paid a further sum of 2*s.*, which was not payable by any one, but such a payment cannot be payment of rate by the respondent within the 4th sub-section.

BRETT, J. It seems to me that the respondent was not assessed to this rate. But, assuming that he was,

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Revising Barrister was wrong. The respondent has not paid an *equal amount in the pound* to that payable by other ordinary occupiers in respect of the poor-rate made in *May*, 1872, so as to satisfy the 4th sub-sect. of sect. 3 of the Representation of the People Act, 1867. True, a sum of money equal to the full amount of that rate has been paid by the owner of the house; but the sum paid by the owner of the house in the first instance was only a composition of the rate, and although a sum, equal to the difference between the composition and the full rate, was also subsequently paid, and, as the case finds, paid by the owner of his own accord, the latter payment could not be deemed a payment of *rate*, for it was a payment in respect of which there was no one liable. The remedy for this, as regards the franchise, was in the respondent's own hands. He should have tendered the full amount of the rate, and claimed to be rated, but not having done so he cannot be deemed either to have been rated, or to have paid the full rate. The Poor Rate Assessment and Collection Act, 1869, has no application, for this case is not brought within its provisions: *Cross* v. *Alsop* (*a*). Even if the respondent could be deemed to have been rated, there was no rate on any one to the full amount, so that an equal amount of rate with that payable by other ordinary occupiers has unquestionably never been paid.

Gorst, for the respondent. There is no question of rating raised by this case. The question depends entirely

(*a*) 1 *Hopw. & Colt.* 444: L. R. 6 C. P. 214.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

UNDER THE STAT. 6 VICT. c. 18,

IN

HILARY TERM, 1874,

IN THE

THIRTY-SEVENTH YEAR OF QUEEN VICTORIA.

1874.

BOON, Appellant; HOWARD, Respondent.

Jan. 22, 26, 31.

Sec. 61 of the Representation of the People Act, 1867, enacts that "unless there is something in the context repugnant to such construction, the word 'dwelling-house' shall include any part of a house occupied as a separate dwelling and separately rated to the relief of the poor."

AT a Court held by the Revising Barrister appointed to revise the list of voters for the city of *Exeter*,

Held, per *Keating*, J., and *Denman*, J., that in reference to the dwelling-house franchise under sec. 3, these words are satisfied where "the part of the house in respect of which the franchise is claimed, has, during the whole of the qualifying twelve months, been occupied as a separate dwelling, and is, during that period, *separately rated* (or, more properly speaking, named in the rate as the subject-matter in respect of which its occupier is separately rated) to all rates *made* during the qualifying year."

Per *Brett*, J., and *Honyman*, J., that the "part of a house" referred to in sec. 61, must have been the subject of *a separate rating during the whole* of the qualifying year.

The exception in the 7th sec. of the Representation of the People Act, 1867, cannot be applied to any parliamentary borough in which, at the time of the passing of the Representation of the People Act, 1867, there was no statute in force by which the owner could be rated instead of the occupier.

Stamper v. *The Overseers of Sunderland*, *L. R.* 3 *C. P.* 388, discussed.

The claimant had during the qualifying year occupied part of a house in a borough consisting of two rooms, in which he and his family entirely lived. The rooms were not structurally separate from the rest of the house. They were connected by a staircase and passage used in common by the claimant and the occupiers of the rest of the house. The landlord did not live on the premises, or retain any control over them, the outer door being under the control of the claimant and other tenants only. Two

the appellant duly objected to the name of the respondent being retained on the list of voters for the parish of *All-hallows-on-the-Walls*, in the said city, in respect of his occupation of a dwelling-house.

The respondent, on the 31st of *July*, 1873, occupied, and had occupied for the preceding twelve calendar months, part of a house, consisting of two rooms, which were not structurally separate from the rest of the house.

The two rooms were connected by a staircase and passage, which were used by the respondent in common with the persons who occupied the rest of the house.

The respondent and his family lived entirely in these two rooms, sleeping, and cooking, and having their meals therein.

The landlord did not live on the premises or retain any control over them; but the other rooms in the house were let out in a similar manner to other tenants. (*a*)

Two rates were made in the parish during the twelve months ending the 31st of *July*, 1873, viz., *November*, 1872, and *May*, 1873; and in both those rates the two rooms were rated separately from the rest of the house, at the sum of £3 10*s.*; and the respondent was rated in respect of them.

At the time of the passing of the Representation of

rates were made during the qualifying year, *viz.* in *November*, 1872, and *May*, 1873, and in both the claimant was separately rated for the two rooms; but in the last preceding rate (*May*, 1872,) the two rooms had not been separately rated. When the Representation of the People Act, 1867, passed, there was no statute in force in the borough by which the owner of small tenements could be rated instead of the occupier. The Revising Barrister having held that, so far as the question was one of fact, the two rooms were occupied by the claimant as a separate dwelling, and separately rated.

(*a*) It was agreed that the argument of the case should proceed on the assumption that there was an outer door to the house, over which the tenants only had control.

Held, per *Keating*, J., and *Denman*, J., that the claimant was entitled to the dwelling house franchise under sec. 3 of the Representation of the People Act, 1867.

Per *Brett*, J., and *Honyman*, J., that he was not, for the rooms were not separately rated during the *whole* of the qualifying year; and per *Brett*, J., they were not occupied as a separate dwelling within sec. 61.

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the People Act, 1867 (30 and 31 *Vict.*, c. 102), there was no Act in force in the parish or in the city of *Exeter* authorizing the rating of the owner instead of the occupier in the case of small tenements; but it was usual, in the case of such tenements, for the owner to pay to the collector the rates instead of the occupier; and, where this was done, the overseers usually rated each whole house as one tenement, placing in the occupier's column the name of one of the persons so occupying part of the house, and the words "and others" to represent the remainder of the occupiers, the rating being the same as if the whole were joint occupiers of the whole house, instead of separate occupiers of different parts of it. It seldom happened that the occupier of a separate part of a house was separately rated for that part.

In consequence of an opinion expressed by the Revising Barrister when revising the lists of voters for the City of *Exeter* in the year 1872, that practice had been changed, and the overseers had separately rated the occupiers of parts of houses in respect of the parts occupied by them, except when such persons only occupied as lodgers.

The rooms occupied by the respondent were not rated separately from the rest of the house at the time of the passing of the Representation of the People Act, 1867; but the owner was not rated for them instead of the occupier; and there was no evidence to show whether they were or were not then occupied separately from the remainder of the house. The respondent did not at that time occupy them.

The rooms were not rated separately from the rest

of the house to the rate made in *May* 1872, which was the last rate made before the commencement of the year ending the 31st of *July*, 1873.

It was contended on the part of the objector that the respondent was not entitled to have his name retained on the list, for the following reasons:—

1. Because the rooms occupied by him were not structurally separate from the rest of the house.

2. Because the portion of the house occupied by him included the staircase and passage, and the staircase and passage were occupied by him jointly with the other tenants of the house.

3. Because, until the first rate made after the 31st of *July*, 1873, the rooms were not separately rated, and therefore they did not constitute a "dwelling-house," the occupation of which would qualify the voter during the part of the electoral year preceding the making of that rate.

4. Because, according to the decision of *Stamper* v. *Overseers of Sunderland* (*a*), and the judgment of *Bovill*, C.J., in *Thompson* v. *Ward* (*b*), the rooms ought not to have been separately rated, and the rating of them illegally by the overseers did not constitute them a "dwelling-house" within the meaning of the Representation of the People Act, 1867.

It was contended on the part of the voter—

1. That since, by the interpretation-clause (s. 61) of the Representation of the People Act, 1867, it is provided that any part of a house shall, if occupied as a separate dwelling and separately rated, constitute a dwelling-house, it was not necessary that the part

(*a*) *L. R.* 3 *C. P.* 388. (*b*) *Hopw. & Colt.* 530; *S. C. L. R.* 6 *C. P.* 327.

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occupied by the voter should be structurally separate from the rest, to render it a dwelling-house within the meaning of the Act.

2. That the two rooms constituted a separate dwelling, and were alone the subject of the voter's occupation, the use of the stairs and passage being an exercise of an easement belonging to him in right of his occupation of the rooms.

3. That the separate rating required by the definition of a "dwelling-house" was a separate rating in the rates made during the electoral year; and that a part of a house which was during the whole of the electoral year separately rateable, and which was, in fact, rated to all the rates made during the electoral year, fulfilled the condition required by the definition with respect to rating.

4. That the decision of *Stamper* v. *Overseers of Sunderland* (*a*) applied only to boroughs in which, at the passing of the Representation of the People Act, 1867, the owner was rateable instead of the occupier under the provisions of the Small Tenements Act (13 and 14 *Vict.* c. 99) or local Acts then in force, and had no application to boroughs in which the common law with respect to rating was in force, and where, therefore, the parts of a house which were separately occupied could only fail to be separately rated through the neglect of the overseers.

5. That whether the said two rooms ought to have been rated or not could not affect the voter's right to have his name retained on the list, such rooms having been in fact separately rated as required by the definition

(*a*) *L. R.* 3 *C. P.* 388.

of "dwelling-house" in the Representation of the People Act, 1867.

The Revising Barrister held, as far as it was a question of fact for his decision, and as far as he was justified in so holding consistently with the facts above stated, that the two rooms were occupied by the voter as a separate dwelling-house, and were separately rated to the relief of the poor; and he decided that the respondent was entitled to have his name retained on the list of voters; and he accordingly retained his name on the list.

The names of nineteen other persons were objected to under similar circumstances.

The question for the opinion of the Court was, whether the respondent was entitled to have his name retained on the list of voters.

Lopes, Q.C., for the appellant.—There is a point preliminary to the discussion of the main question, viz., that this case is governed by the authority of *Thompson* v. *Ward* (*a*), which is a decision directly in point. That case is not the less, it is submitted, binding upon this Court as a decision, because the Court were there equally divided in opinion. *Webster* v. *The Overseers of Ashton-under-Lyne, Hadfield's* case (*b*), shows that the Court will not overrule its former decisions unless it can be shown that they were clearly wrong.

[KEATING, J.—Do you contend that the law is to depend upon the way in which the Revising Barrister

(*a*) 1 *Hopw. & Colt.* 530; *S. C.* *L. R.* 6 *C. P.* 327.

(*b*) 2 *Hopw. & Colt.* 89; *S. C.* *L. R.* 8 *C. P.* 306.

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decided in the former case, and that in the present case we ought to decide in your client's favour without even hearing argument upon the principal question ?]

Having regard to the admitted legal difficulties which *Thompson* v. *Ward* (*a*) involved, and to the doubts entertained by the Judges and to their ultimate difference of opinion, the Court can hardly come to the conclusion that the decision in *Thompson* v. *Ward* (*a*) was clearly wrong. If not, then the doctrine laid down in *Hadfield's case* (*b*) applies, and the Court will not overrule its former decision.

If, however, the Court be of opinion that the discussion of the general question must proceed, then it is submitted, firstly, that here there was no occupation of the subject-matter as a separate dwelling, and that on this point the judgments of *Willes* and *Brett*, J.J., in *Thompson* v. *Ward* (*a*), are correct. The respondent was not the occupier of a "dwelling-house" within sec. 3, subsec. 2, of 30 & 31 *Vict.* c. 102, nor within the interpretation put upon the word "dwelling-house" by the 61st section. "Dwelling-house" is, by the 61st section, interpreted to include "part of a house," not, as the other side contend, "occupied separately," but "occupied as a *separate dwelling*." That language shows that, with reference to the dwelling-house franchise a separate subject of occupation was intended, whereas, in the case of the lodger franchise, under sec. 4, the words "as a lodger" has occupied "separately" are

(*a*) 1 *Hopw. & Colt.* 530 ; *S. C. L. R.* 6 *C. P.* 327.
(*b*) 2 *Hopw. & Colt.* 89 ; *S. C. L. R.* 8 *C. P.* 306.

words which have reference only to the mode of occupation, and not, like the words used in defining a "dwelling-house," to the nature of the thing which forms the subject of occupation. In *Thompson* v. *Ward* (*a*), *Willes*, J., was of opinion that the separate dwelling, referred to in sec. 61, must be such a dwelling-house as would have been a "house" within the Reform Act, and would answer the description of a house as interpreted in *Cook* v. *Humber* (*b*). *Brett*, J., seems to have thought that, although under the Act of 1867 there need not be a structural separation, there must at all events be a practical separation *of the thing occupied* from the rest of the house. To the view taken by *Willes*, J., it has been objected that it gives no effect to the interpretation clause. It must be borne in mind, however, that it is not the office of an interpretation clause to enlarge the meaning of the words which it interprets, and in *Brewer* v. *Mc Gowen* (*c*), *Willes*, J., expressly pointed out at least one way in which the interpretation clause might be satisfied. "That definition," said he, "would be satisfied by a part of a dwelling-house with all internal communication cut off, with access secured by a separate outer door, and separately rated." If, on the other hand, the view taken by *Brett*, J., be the correct one, viz.: that there must be a practical separation of the thing occupied, that applies here equally as in *Thompson* v. *Ward* (*a*), since in both cases there was a common user of the staircase and passages.

(*a*) 1 *Hopw. & Colt.* 530; *S. C.* *L. R.* 6 *C. P.* 327.

(*b*) *K. & G.* 413; 11 *C. B. N. S.* 33.

(*c*) 1 *Hopw. & Colt.* 275; *S. C.* *L. R.* 5 *C. P.* 239.

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Secondly. Assume that in order to constitute a "dwelling-house" within secs. 3. and 61, the "part of a house" "occupied as a separate dwelling" need not have been structurally, or even practically, severed. To satisfy the definition in sec. 61, there is this further requirement, that the subject of occupation should have been "separately rated." Reading the definition given by sec. 61 into the 2nd sub-sect. of sec. 3, it follows that the subject of occupation must have been "separately rated" during the whole of the twelve calendar months preceding the 31st of July, and constituting the qualifying year. The rooms occupied by the respondent were not so rated. Though separately rated to all rates *made during* the qualifying year, they were not separately rated to the rate made in the *May* previous to, and in force from the 31st of *July*, until the month of *September* in the qualifying year. The separate rating of the *thing occupied* during the *whole* of the qualifying twelve months is, it is submitted, made indispensable to qualification, where the qualification consists of only part of a house; for it is only while so rated that the thing occupied is defined to be a dwelling-house. It is true that in speaking of a rate as made upon the *thing occupied*, the Legislature may not have used a strictly accurate expression, since the rate is in reality made upon the occupier in respect of the thing occupied, and not literally upon the subject of occupation. But the language being that which the Legislature has employed, the Court will do no more violence than is absolutely indispensable, in order to give to it its legal effect. Whether the 3rd sub-sect. of sect. 3 is not also limited to rates made during the qualifying year does not appear

by any means clear. The language there employed differs from that of the corresponding section (sect. 27), of 2 *Will.* 4., c. 45, and "made" may perhaps be construed to mean "existing," so as to apply to all rates existing during the qualifying year. This contention however, is by no means essential to the appellant's argument, for in admitting a humbler class of voters to the franchise, the Legislature may well have thought, that, where they lived in parts of houses, it was desirable to insist on separate rating for a more protracted period than that for which the rating is required in the case of ordinary houses.

Thirdly. The respondent is not, by law, rateable, and the fact of his having been illegally rated cannot give him a qualification. The owner of the whole house, and not the several occupiers of apartments in it is, under sect. 7 of the Representation of the People Act, 1867, the proper person to be rated. The case falls within the express words of the exceptive clause in that section. There is clearly a "dwelling-house or tenement" which is "wholly let out in apartments or lodgings, not separately rated;" "not separately rated according to *Stamper* v. *the Overseers of Sunderland*," (*a*) having been judicially construed to mean, "not separately rated at the time of the passing of that Act." Now in such cases the exceptive clause expressly says, "that the owner of the dwelling-house or tenement shall be rated in respect thereof to the poor rate." No doubt, it is a rule of construction that a case is not within an exceptive clause unless it would also come within the enacting clause, if not taken out of it by the exception. But this case would, it is

(*a*) *L. R.* 3 *C. P.* 388.

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submitted, fall within the scope of the enactment. It is true that the words at the commencement of the section seem to be limited to those cases in which, previously to the passing of the enactment, there was an owner liable to the rates. But the succeeding words are much more general. The words relied on for their generality are as follows:—"The following enactments shall take effect with respect to rating in *all* boroughs."

[BRETT, J. Do you contend that that language applies to all boroughs, or do you limit it to all parliamentary boroughs?]

It is limited, no doubt, to parliamentary boroughs. Borough is defined by sect. 61 to mean "any borough, city, place, or combination of places, not being a county as herein-before defined, returning a member or members to serve in Parliament."

The judgment of *Bovill*, C.J., in *Thompson* v. *Ward* (*a*), is, on this branch of the argument, favourable to the appellant. He there said (*a*), "In *Stamper* v. *Sunderland, Overseers* (*b*), the Court decided that where a house is wholly let out in apartments, as in the present case, and the several occupiers were not separately rated at the time the Act passed" (which is the case here), "the *owner* was, by the express terms of sect. 7 of the Representation of the People Act, 1867, the proper party to be rated, and that the occupiers of the several rooms could not properly, after the passing of that Act, be rated in respect of their separate occupations." And again, (*c*) "unless their apartments were separately rated when

(*a*) 1 *Hopw. & Colt.*, p. 585; *S. C.* *L. R.* 6 *C. P.* 361.

(*b*) *L. R. S.* C. *P.* 388.

(*c*) 1 *Hopw. & Colt.* 588; *S. C.* *L. R.* 6 *C. P.* 364.

the Act was passed, these occupiers could not properly, under the Act of 1867, be rated to the relief of the poor."

Lastly. There can have been no sufficient payment of rates by the respondent. The case finds that, in *May*, 1872, the two rooms occupied by the respondent were not separately rated. There would, therefore, be one rate at a lump sum made upon the whole house, and how could the proportion of it payable by the respondent, in respect of his two rooms, have been ascertained so as to enable him to make the payment?

Flatcher v. *Boodle* (*a*) was also referred to.

Kingdon, Q.C., for the respondent.—First. As regards the question of structural severance, the true solution is to be found in the judgments of *Bovill*, C. J., and *Keating*, J., in *Thompson* v. *Ward* (*b*), that having regard to the subtle distinctions which were perpetually being taken under the old law, as to what constituted a severance in fact, the Legislature intended, by the Act of 1867, to get rid for the future of the difficulties which had arisen as to when *part* of a house was to be considered a *house*, and to give the franchise in all cases where the part of the house was occupied separately, and separately rated. Under the old law, part of a house occupied as a warehouse conferred the franchise; and there seems nothing unreasonable in a similar enactment being passed to meet the case of its being occupied as a dwelling. As regards the difficulty suggested by *Brett*, J., that the occupation of the staircase and passage is joint, it is submitted that the two rooms, not the staircase and passage, constitute the

(*a*) *Hopw. & Ph.* 238; *S. C.* 18 *C. B. N. S.* 152.
(*b*) 1 *Hopw. & Colt.* 530; *S. C. L. R.* 6 *C. P.* 327.

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"dwelling" which forms the subject of the respondent's occupation, and that the right to use the staircase and passage is a mere casement. Precisely the same difficulty might be suggested in the case of a claim to the franchise in respect of a flat in *Victoria Street*, or of chambers in the *Temple*. No doubt, as regards chambers in the *Temple*, it may be said that, as they at present exist, there is no outer door at the entrance from the court or street to the passage which communicates with the staircase. But, suppose that the Benchers, for the convenience and protection of their tenants, erected an outer door there, could it be contended that the effect of this would be to deprive the tenants of their votes? The rooms, it is submitted, not the staircase and passage, are the subject of the demise; the staircase and passage may be regarded as in the landlord's occupation. This position is not inconsistent with the somewhat loosely worded expression, that the tenants have the control over the outer door. No doubt, the door is there for the tenant's protection, and it must be taken that they have free right of ingress and egress at their pleasure. But when one outer door exists, the existence of a second cannot, it is submitted, be the true criterion as to the right to the franchise. It is sufficient for each tenant that he has an outer door of his own, over which he has exclusive control, and the existence of a second outer door beyond the first cannot operate to deprive him of his franchise. *Lord Coke*, in the 3rd Institute (*a*), says, "A chamber or room, be it upper or lower, wherein any person doth inhabit or dwell, is *domus mansionalis* in law."

(*a*) *P.* 65.

Secondly. The respondent was not bound to be separately rated to all rates in existence during the qualifying year, but only to all *rates made* during that period. Here he was so rated. The 2nd and 3rd sub-sections of sect. 3 of the Representation of the People Act, 1867, must be taken in conjunction with sect. 61, and read together, so as to give to the whole a consistent meaning. Now, the language of the 3rd sub-section shows, as is submitted, with sufficient distinctness that the rating need only be to rates *made* during the qualifying year. The words "all rates (if any) made," must mean "made" "during the time of such occupation," i.e., during the time that occupation is required by the previous sub-section; in other words, during the qualifying year. And, on referring to the language of 2 *Will.* 4, c. 45, s. 27, this interpretation seems to be put beyond a doubt, for the words there are express that the person to be registered "shall have been rated in respect of such premises to all rates" "*made during the time of such his occupation* so required as aforesaid." It is surely inconceivable that the Legislature could have intended to prescribe a different period of rating in the two statutes, when the language it has employed is so nearly identical in its terms. The appellant's construction is also open to the objection that it would practically disfranchise the whole of this class of voters in the first year of their occupation, as they would have no means of getting their names inserted on the rate that was current at the time of their entry.

Thirdly. The respondent was by law rateable for the two rooms forming the subject of his occupation. He clearly would be apart from sec. 7 of the Representation

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of the People Act, 1867, and that section has no application except in cases where the owner was rated at the time when the Act passed. Now, here the owner was not then rated; nor indeed could he have been, since the case expressly finds that there was not at that time any Small Tenements Act in force within the borough. But even if the wider interpretation of the section for which the other side has contended can be held to be correct, still it is submitted that, there having been no appeal against the rate, the respondent, who as matter of fact is separately rated, has complied with the requirements of the Act and is entitled to the franchise. No doubt, if with the view of giving the franchise to one who was not entitled to it, the overseers were collusively to rate him, that would be a different case, admitting probably of a different consideration. But, in the absence of fraud or collusion, it is submitted that it is sufficient if, as here, the party has been separately rated in fact, and has not appealed. Further, it may well be doubted whether the construction put on the words "not separately rated," in *Stamper* v. *The Overseers of Sunderland* (*a*), is one that can be deemed satisfactory, and in regard to that case it must also be borne in mind that it came before the Court for decision upon an appeal against a rate, and not upon the question of the right to the franchise.

Fourthly. As regards the payment of the rates, no question is raised. The respondent is moreover only bound to pay rates that have become payable by him in respect of the premises. There is nothing to show that

(*a*) *L. R.* 3 *C. P.* 388.

the rate made in *May*, 1872, ever became payable by the respondent, or, if it did, that it was not, in point of fact, paid.

Lopes, Q.C., was heard in reply.

The members of the Court differing in opinion, the following judgments were now (*January* 31) delivered :—

HONYMAN, J. In this case, which was an appeal against the decision of the Revising Barrister for the city of Exeter, I am of opinion that the decision is erroneous, and ought to be reversed.

The question turns on the proper construction of ss. 3 and 61 of 30 & 31 *Vict.* c. 102.

It appears that the voter had been from the 31st of *July*, 1872, the occupier of two rooms in a house, which it was found by the barrister were not structurally separate from the rest of the house; such two rooms being connected by a staircase and passage used by the voter in common with the persons occupying the rest of the house.

The last rate made for the parish before the commencement of the electoral year beginning on the 31st of *July*, 1872, was made in the month of *May*, 1872; and in this rate the two rooms were not rated separately from the rest of the house. During the electoral year beginning on the 31st of *July*, 1872, two rates only were made, viz., one in *November*, 1872, and the other in *May*, 1873, and in those the two rooms were rated separately from the rest of the house, the voter being

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rated for them; so that in fact there was no separate rating of the premises from the 31st of *July*, 1872, to the month of *November*, 1872.

It was objected to the vote, among other things, that the qualification was insufficient, because, assuming that the two rooms constituted a dwelling-house within s. 61 of the Act of 1867, they had not been separately rated during the whole of the electoral year.

The Revising Barrister was of opinion that the voter was duly qualified, and retained the name on the list.

Before the Act of 1867, it had been settled by the decisions that the occupier of part of a house used, not as a counting-house, but as a dwelling, was not entitled to vote, unless the part of the house was so actually severed from the rest of the house as to be a house of itself: see *Cook* v. *Humber* (*a*); *Henrette* v. *Booth* (*b*).

What, then, is the effect of the new Act? To ascertain this, we must look at s. 3. This section contains four sub-sections differently worded,—see *Cull* v. *Austin* (*c*),—and directed to different subjects. The 1st relates to the personal capacity of the voter; the 2nd, to the subject-matter of occupation, and the length of it; the 3rd, to the rating of the voter; and the 4th, to the payment of rates.

The 2nd subsec. requires that the voter should, during the *whole* of the twelve months preceding the 31st of *July* in any year, have been an inhabitant occupier of "a dwelling-house" within the borough. Now, the

(*a*) *K. & G.* 413; *S. C.*, 11 *C. B. N. S.* 33.

(*b*) *Hopw. & Ph.* 23; *S. C.*, 15 *C. B. N. S.* 500.

(*c*) 1 *Hopw. & Colt.* 741; *S. C. L. R.* 7 *C. P.* 227.

61st section of the Act says that, unless there be something in the context repugnant thereto, the word dwelling-house shall include "any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor." Now, let us read the 2nd sub-section of the 3rd section as if these words were incorporated in it, so as to see what the Legislature intended to say should be a sufficient occupation, and it will read,—"has been, *during the whole of the twelve months preceding the 31st of July*, an inhabitant occupier of any dwelling-house, or any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor."

It has been argued that the object of the Legislature in the 61st section was to do away with the distinction between a part of a house structurally severed from the rest, and one not so severed, provided it be occupied as a separate dwelling; and probably this was the intention; but it must be borne in mind that the Legislature has further required that it should be separately rated; and it seems to me that, where the part occupied by the voter has not been separately rated during the whole of the electoral year, the voter has not for the whole twelve months occupied the thing described by the Legislature.

It is clear that, before the Act of 1867, the voter had no sufficient qualification unless the rooms occupied by him had been structurally severed during the whole year; and it seems to me that, if the Legislature intended to do away with the doctrine as to structural severance, their intention was to substitute for structural severance a separate rating for the same period.

It was contended on behalf of the respondent that it

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dent in common with the persons who occupied the rest of the house. The respondent and his family lived entirely in these two rooms, sleeping, and cooking, and having their meals there. The landlord did not live on the premises or retain any control over them; but the other rooms in the house were let out in a similar manner to other tenants. There was an outer door to the house, over which the tenants only had control.

Upon this state of facts, it was contended on the part of the objector that the respondent was not entitled to have his name retained on the list of voters,—first, because the rooms occupied by him were not structurally separate from the rest of the house,—secondly, because the portion of the house occupied by the respondent included the staircase and passage, and the staircase and passage were occupied by him jointly with the other tenants of the house,—thirdly, because, until the first rate made after the 31st of *July*, 1873, the said rooms were not separately rated, and therefore they did not constitute a "dwelling-house," the occupation of which would qualify the voter, during the part of the electoral year preceding the making of the said rate,—fourthly, because, according to the decision of *Stamper* v. *Overseers of Sunderland* (*a*), and the judgment of *Bovill*, C.J., in *Thompson* v. *Ward* (*b*), the said two rooms ought not to have been separately rated, and the rating of them illegally by the overseers did not constitute them a dwelling-house within the meaning of the Representation of the People Act, 1867.

(*a*) *Law Rep.* 3 *C. P.* 388.

(*b*) 1 *Hopw. & Colt*, 530; *S. C. L. R.* 6 *C. P.* 327.

The Revising Barrister held, *as far as it was a question of fact for his decision*, that the two rooms were occupied by the respondent as a separate dwelling, and were separately rated to the relief of the poor, and retained the name of the respondent on the list; and the question for the Court is, whether his name, and those of nineteen other persons similarly circumstanced, ought to be retained on the list.

Though the argument upon the case involved the consideration of more than one statute and of several cases decided before the passing of 30 & 31 *Vict.* c. 102, I am of opinion that the decision of the questions raised upon this appeal depends entirely upon the construction to be placed upon three sections of that statute; and that previous statutes and cases are only important so far as they throw light upon the probable intention of the Legislature in passing the enactments upon which the present case turns.

The first section to which our attention was called is sect. 3 of the Act, which enacts as follows:—"Every man shall, in and after the year 1868, be entitled to be registered as a voter, and when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows, that is to say, 1. Is of full age and not subject to any legal incapacity; 2. Is on the last day of *July* in any year, and has during the whole of the preceding twelve calendar months been, an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough; 3. Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in

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respect of such premises; and, 4. Has on or before the 20th day of *July* in the same year, *bonâ fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates that have become payable by him in respect of the said premises up to the preceding 5th day of *January*: Provided that no man shall, under this section, be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house."

The first part of this section which it is necessary to discuss critically is subs. 2. This sub-section is intended to secure, first, that the voter shall be the inhabitant occupier, as owner or tenant, of a dwelling-house within the borough; and, secondly, that his occupation shall not be one of a few weeks' or months' duration, but that it shall have extended over the whole twelve months ending on the 31st of *July* in the year of registration. Taking the case of an ordinary dwelling-house wholly and exclusively occupied by one person, this is a clause easily understood and applied; and it is only when the word "dwelling-house" is contemplated under different circumstances from those that any real difficulty arises. It must, however, be here observed that this sub-section relates wholly to the subject of occupation—first, as to the thing occupied (the dwelling-house) —secondly, as to the kind of occupation (as inhabitant owner or tenant)—and, thirdly, as to the time of occupation (one whole year, &c.), requisite for the attainment of the franchise. It is a sub-section wholly confined to the topic of *occupation*.

Then follows subs. 3, which is wholly confined to a second subject-matter or requisite of the franchise in

question, viz., the *rating* of the occupier who has been already defined by subs. 2. This sub-section requires that the above-mentioned occupier shall, *during the time of such occupation*, have been rated as an ordinary occupier in respect of the premises so occupied by him within the borough, *to all rates (if any) made for the relief of the poor in respect of such premises.*

A question has been raised in this case as to the extent and meaning of this requirement. In my opinion, it merely requires the occupier in question to have been rated in respect of the premises occupied by him within subs. 2, to all rates made *after* the 31st of *July* in the year preceding the year of registration.

It was contended by Mr. *Lopes*, on the part of the appellant, that this subsection required the rating of the respondent to the last rate made *before* the commencement of the qualifying year. But I can find nothing in this subsection to warrant me in so holding; and so to hold would, in my opinion, be inconsistent with several cases decided upon this subsection, in all of which the question has been whether the voter was rated to all rates made during the year, and not extended to an inquiry as to the rates made, *even in part*, before the commencement of the year: *Jones* v. *Bubb* (*a*); *Ainsworth* v. *Creeke* (*b*); *Cull* v. *Austin* (*c*); see also *Clarke* v. *Brown* (*d*), which decided, under a different enactment, but in almost identical words, that, where *no poor-rate*

(*a*) 1 *Hopw. & Colt.* 128; *S. C. L. R.* 4 *C. P.* 468.

(*b*) 1 *Hopw. & Colt.* 141; *S. C. L. R.* 4 *C. P.* 476.

(*c*) 1 *Hopw. & Colt.* 741; *S. C. L. R.* 7 *C. P.* 227.

(*d*) 1 *Hopw. & Colt.* 181; *S. C. L. R.* 4 *C. P.* 500.

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was made within the time mentioned in the Act, the franchise was acquired by the voter.

The third head of qualification beyond occupation for twelve months of the qualifying tenement, and being rated to rates made during those twelve months, is that contained in subs. 4, viz., "has on or before the 20th *July* in the same year *bonâ fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates *that have become payable by him* in respect of the premises up to the preceding 5th day of *January*."

The words of this subsection have received judicial construction. In the case of *Abel* v. *Lee* (*a*) it was held that the words "all poor-rates payable by him" were not restricted to all poor-rates *made* during the qualifying period, but included a rate made in the *June* previous to the commencement of the qualifying year in which the voter was rated; and that excusal of such rate was not equivalent to payment: and I think it must be inferred that, even if he had not been separately rated to that rate, but by virtue of some statute had been *liable to pay it*, though originally made upon others, the same result would have followed. This subsection was again under consideration in the case of *Cull* v. *Austin*. There, a rate in which the voter was rated was made on the 2nd of *February*, 1867, and was then payable by him. He had afterwards, without any application of his own, been excused by order of justices from the payment of this rate. It was again held that this excusal was not equivalent to payment, and that had the rate in question

(*a*) 1 *Hopw. & Colt.* 515; *S. C. L. R.* 7 *C. P.* 227.

been one made between the 5th of *January* of the year preceding the qualifying year, and the fifth of *January* of the qualifying year, and up to that time payable by the claimant, no vote would have been gained.

These decisions seem to me to apply only to the case of a person who has either been himself rated to some rate payable by him during the prescribed period, or to the case of a person from whom a rate has become payable by virtue of some statutory or other obligation, by reason of his occupation of the premises (though he may not be named in the rate), upon the neglect or default of some one else to pay; and not to include the case of a rate made upon others, and already paid. I can find nothing in the statute requiring the voter to get his name placed upon the rate-book in respect of rates made upon other persons before the commencement of the qualifying year, and paid by them.

Before stating my opinion upon the more important and difficult question in this case, it will be as well to dispose of the objections raised to the vote, in respect of non-compliance with sub-sections 3 and 4 of sect. 3. The facts have been already stated; and, first, as to subs. 3. It was contended that the voter had not been rated to all rates made for the relief of the poor during the qualifying period, because in a rate which had been made in the month of *May*, 1872,—which was the last rate made before the commencement of the qualifying year,—the rooms were not rated separately from the rest of the house, and that a rate so made remained a rate made in respect of the premises during part of the qualifying year, and, being made in respect of the quali-

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fying premises, was a rate to which the respondent ought to have been rated.

I can find no authority for holding that, upon the true construction of this section, there is any necessity for the rating of the voter to any rates except those made during the year. The cases cited above seem to me to dispose of this objection so far as subs. 3 is concerned. I will, therefore, pass on to the objection raised upon subs. 4.

It was argued for the appellant, that, assuming the rate of *May*, 1872, was not *made* during the qualifying year, still it was payable by the respondent, and not paid by him to the extent and in the manner provided for by subs. 4. But it does not appear from the case that this objection was raised in this shape before the Revising Barrister; and no facts are stated from which it can be inferred that if this rate was in any sense payable by the respondent in respect of the premises, it remained unpaid during any part of the qualifying year either by him or anybody. It may consistently with the facts of the case have been fully paid by him, or the owner, or any one, before the 20th of *July*, 1872. I think, therefore, that, assuming the respondent to have occupied a "dwelling-house," within the meaning of subs. 2 of sect. 3, there is no ground for saying that he does not bring himself within both of the subsections 3 and 4.

I now come to the main question discussed in the case.

It was contended for the appellant that the respondent was not entitled to the vote, because he did not fall within the description of subs. 2, as a person who "was on the last day of *July*, 1873, and had during the whole of the preceding twelve calendar months been, an inha-

bitant occupier, as owner or tenant, of a dwelling-house within the borough." This objection was in fact a series of objections, some of them raising very difficult and important questions. In order to state these properly, it is necessary to refer to sect. 61 of the Act, upon which the respondent and the appellant both relied, and which enacts that the word "dwelling-house" shall *include* "any part of a house occupied *as a separate dwelling*, and separately rated to the relief of the poor." It is also necessary to bear in mind the proviso at the end of sect. 3, "that no man shall under this section be entitled to be registered or to vote *by reason of his being a joint-occupier* of any dwelling-house." The appellant contended that the respondent did not, under the circumstances of the case, occupy a dwelling-house; that, the premises occupied by him not being structurally severed from the rest of the house of which they formed part, *Cook* v. *Humber* (*a*) applied; that, if resort was had to sect. 61, still the words of that section, "as a separate dwelling," were not complied with; that, even if the rooms occupied by the respondent could be considered a separate dwelling within sect. 61, they were not a separate dwelling which had been separately rated to the relief of the poor during the *whole* qualifying year, and therefore subs. 2 had not been complied with; that the occupation of the respondent was a joint occupation of a dwelling-house, and therefore within the proviso of sect. 3; that the respondent occupied as a lodger, and not as owner or tenant; and that the premises in question were part of a house wholly let out in lodgings, and

(*a*) *K. & G.* 413; *S. C.* 11 *C. B. N. S.* 33.

that he must, for the purposes of this appeal, be considered the occupier of a dwelling-house, and that his premises must be considered a dwelling-house within the meaning of the Act of Parliament."

This view of the matter disposes of several of the specific objections raised upon the construction of sects. 3 and 61. The objection founded upon the proviso at the end of sect. 3 fails, because the "dwelling-house" here being the two rooms which the respondent solely occupies as a separate dwelling, there is no joint occupation in respect of the dwelling-house by reason of his joint occupation of something else, viz. the staircase and passage. The objection founded upon the want of structural severance also fails, because, according to the view of *Bovill*, C.J., which I adopt, that is not essential, provided there be a separate dwelling, separately and not jointly occupied. The objections founded upon the argument that the occupation was that of a lodger and not of a tenant also fail, if the words of sects. 3 and 61 are large enough, as I think they are, to include the case and to confer the franchise upon the respondent.

A more formidable argument remains. It was contended by the appellant that sect. 61 itself, in defining the cases in which a "part of a house" shall be included in the word "dwelling-house," adds a limitation which is fatal to the respondent's case; for that it must be a "part of a house separately rated to the relief of the poor; and that if this limitation be read in, as it was contended it ought to be when applying sect. 3, subs. 2 to the case of part of a house, it becomes clear that the "part of a house" which is to qualify as a dwelling-house, must not only have been occupied separately as a separate dwelling for the whole qualifying year, but must

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therefore not properly the subject of a separate rateability of the occupiers of such lodgings or apartments, but such as the owner ought to be rated for, within the decision of *Stamper* v. *Overseers of Sunderland* (*a*).

Mr. *Lopes*, in his argument for the appellant, relied mainly upon the judgments of *Willes* and *Brett*, JJ., in the case of *Thompson* v. *Ward* (*b*); but, inasmuch as the Court was there equally divided upon the question raised, it becomes necessary to consider the case as one of the first impression, and to look to the reasons given on both sides in the different judgments in that case, rather than to the result of it, which was merely an affirmance of the rejection of the vote by the Revising Barrister. In the present case the Revising Barrister has allowed the vote; and I do not think it would be reasonable to complain of that course having been taken under the circumstances.

The facts in *Thompson* v. *Ward* (*b*) were extremely similar to those in the present case, but not identical. The existence of an ash-pit, and a privy, and other conveniences used in common by the occupiers of the rooms inhabited, appears to have been a material consideration in inducing one member of the Court to hold that the *room* occupied by the claimant was not the whole subject-matter of occupation, and that therefore there was a joint and not a separate occupation in that case. In the present case, however, it appears clear that the

(*a*) *L. R.* 3 *C. P.* 388.

(*b*) 1 *Hopw. & Colt.* 530; *S. C. L. R.* 6 *C. P.* 327.

only part of the house in respect of which the respondent was rated as for a "dwelling-house" was, the two rooms in which he dwelt; and the question is therefore much more distinctly raised, whether those two rooms could or could not constitute a "dwelling-house" for which a vote could be acquired. I am of opinion that they could, and that, it having been found by the Revising Barrister, so far as it was a question of fact for him, that they did, there is no ground for holding the contrary.

For the purpose of the present case, I think it may be conceded that the occupation of the rooms in question would not have conferred a vote, though all other requisites existed, as being the occupation of a "house" within the meaning of sect. 27 of 2 *Wm.* 4, c. 45. But, in considering the meaning of sects. 3 and 61 of 30 and 31 *Vict.* c. 102, I think it must be borne in mind that extremely difficult questions had arisen as to what does constitute a house, which would make it particularly desirable for the Legislature to adopt some definition which would prevent the recurrence of similar difficulty, when the franchise was to be conferred for the first time in respect of the occupation of a "dwelling-house," independently of its value.

It was, as it seems to me, entirely with the view of preventing similar questions to those which had arisen in *Cook* v. *Humber* (*a*) and other cases that the Legislature introduced into the Act of 1867 the 61st clause, so far as it relates to the word "dwelling-house." The effect of *Cook* v. *Humber* (*a*) cannot be better stated than in the words of *Brett*, J., in *Piercy* v. *Maclean* (*b*): "All that

(*a*) *K. & G.* 413; *S. C.* 11 *C. B. N. S.* 33.

(*b*) 1 *Hopw. & Colt.* 385; *S. C. L. R.* 5 *C. P.* 261.

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Cook v. *Humber* (*a*) decides is, that the occupier of part of a house not structurally severed from the rest confers no vote, because house in sect. 27 of 2 *Wm.* 4, c. 45, means a whole house." But, in deciding what was a *whole* house, questions of great doubt and difficulty arose: see *Henrette* v. *Booth* (*b*).

After the most careful study of all the arguments used in the case of *Thompson* v. *Ward* (*c*), and in the present, and of the very elaborate judgments in that case, I have come to the conclusion that the law and its application to that case as well as to this (and even *à fortiori* to this) cannot be more correctly stated than in the following passage from the judgment of *Bovill*, C.J., in Law Rep. 6 C. P. p. 363 (*d*):—"Upon that question,"—whether the premises occupied by the claimant were a dwelling-house within the meaning of the Act,—"it seems to me that the Legislature intended to make 'any part of a house,' as distinguished from a whole house (in the sense in which the term 'house' had been previously interpreted by the Courts), a sufficient subject of occupation, provided it was occupied for the purpose of a dwelling, and as a separate dwelling in the sense of the occupation not being a joint occupation with others of that particular part of the house, and provided there was a wholly independent occupation, as distinguished from that of a mere lodger, and the part of the house was separately rated. The room of the present claimant was part of a house, and the nature of his occupation in this case seems to me to fulfil the three conditions; and, it being found that he was separately rated, I am of opinion

(*a*) *K. & G.* 413; *S.C.* 11 *C.B. N.S.* 33.
(*b*) *Hopw. & Ph.* 23; *S. C.* 15 *C. B. N. S.* 500.
(*c*) 1 *Hopw. & Colt.* 530; *S. C. L. R.* 6 *C. P.* 327.
(*d*) *S. C.* 1 *Hopw. & Colt.* 587.

that he must, for the purposes of this appeal, be considered the occupier of a dwelling-house, and that his premises must be considered a dwelling-house within the meaning of the Act of Parliament."

This view of the matter disposes of several of the specific objections raised upon the construction of sects. 3 and 61. The objection founded upon the proviso at the end of sect. 3 fails, because the "dwelling-house" here being the two rooms which the respondent solely occupies as a separate dwelling, there is no joint occupation in respect of the dwelling-house by reason of his joint occupation of something else, viz. the staircase and passage. The objection founded upon the want of structural severance also fails, because, according to the view of *Bovill*, C.J., which I adopt, that is not essential, provided there be a separate dwelling, separately and not jointly occupied. The objections founded upon the argument that the occupation was that of a lodger and not of a tenant also fail, if the words of sects. 3 and 61 are large enough, as I think they are, to include the case and to confer the franchise upon the respondent.

A more formidable argument remains. It was contended by the appellant that sect. 61 itself, in defining the cases in which a "part of a house" shall be included in the word "dwelling-house," adds a limitation which is fatal to the respondent's case; for that it must be a "part of a house separately rated to the relief of the poor; and that if this limitation be read in, as it was contended it ought to be when applying sect. 3, subs. 2 to the case of part of a house, it becomes clear that the "part of a house" which is to qualify as a dwelling-house, must not only have been occupied separately as a separate dwelling for the whole qualifying year, but must

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during that time have been separately rated; and that, inasmuch as the premises in question in this case had been separately rated *for the first time* in *November*, 1872, they did not come within the word "dwelling-house" by virtue of sect. 61, but, on the contrary, were excluded by that very section.

I must own that I was at first much struck by this argument: but, on full consideration, I think it is unsound. The words relied upon in sect. 61, it must be observed, are not strictly in an *interpretation* clause, but in a clause intended to include a particular subject-matter of occupation,—a part of a house,—under a word which might not otherwise, and often would not, have been held to include it. The clause does not say that "dwelling-house" shall *mean* "part of a house" wherever it is used in the Act, but that it shall include it, if occupied as a separate dwelling, and if separately rated. Under these circumstances, I do not think that the mode suggested, of reading the two clauses, 3, subs. 2, and 61, together would have the effect of putting the two enactments together, so as to do what the legislature intended. Subs. 2 contemplates an occupation of the qualifying tenement for twelve months as a *sine quâ non* of the franchise for a dwelling-house; but subs. 3, as has been already explained, does not absolutely require a separate rating during the whole twelve months, but only a rating to all rates made within the twelve months: and I think that the words of sect. 61 are amply satisfied where the "part of a house" in respect of which the franchise is claimed has, during the whole twelve months, been occupied as a separate dwelling, and is during that period separately rated (or, more properly

speaking, separately named in the rate as the subject-matter in respect of which its occupier is separately rated) to all rates made during the qualifying year, as is required in the case of "dwelling-houses" of any other kind. I think that the intention of the legislature was, in the language used in sect. 61, merely to apply the word "dwelling-house" in sect. 3 to the case of a "part of a house," where occupied as a separate dwelling, and where separately rated, as other dwelling-houses are required to be rated for the purposes of the franchise, *i.e.* to all rates made during the qualifying year.

One further point was made by the appellant. It was said that the rooms occupied by the respondent were such that, according to the authority of *Stamper* v. *Overseers of Sunderland* (*a*), the owner ought to have been rated instead of the occupier. I greatly doubt whether this point was really open to the appellant. The respondent was in fact rated in respect of the rooms in question; and I think very great inconvenience would result if the Revising Barrister were to take upon himself in such cases, there being no appeal against the rate, to decide whether the claimant was properly rated or not; but I do not think that the case of *Stamper* v. *Overseers of Sunderland* (*a*) applies. In that case each occupier occupied one room only. The case found that a water-closet and other conveniences were used in common by the occupiers of the house; and the Court drew the conclusion that the exception in sect. 7 of the Act applied; for that the house was wholly let out as apartments or lodgings not separately rated, and therefore that the owner and not the occupier ought to be rated.

(*a*) *Law Rep.* 3 *C. P.* 388.

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In the present case, the Revising Barrister has found, and that upon facts upon which I think he might reasonably find, that the rooms occupied were occupied as a separate dwelling; and he states that the overseers have separately rated the occupiers of parts of houses *in respect of the parts occupied by them*, except when such persons occupied only as *lodgers*; from which I think it must clearly be inferred that the Revising Barrister, so far as it was a question of fact for him, was of opinion that the present respondent was *not* occupying as a lodger. I think, therefore, that the objection taken under sect. 7 of the Act fails, and that subs. 1 of that section applies, and the occupier was here properly rated.

For these reasons I am of opinion that the Revising Barrister was right in retaining the votes objected to, and that our judgment ought to be for the respondent.

BRETT, J. I have been unable to prepare a written judgment in this case; but, as it is desirable that the matter should be disposed of, I proceed to state my views. The first material fact in the case seems to me to be that, at the time of the passing of the Representation of the People Act, 1867 (30 & 31 *Vict.* c. 102), there was no Act in force in the city of Exeter authorizing owners of houses to be rated instead of the occupiers. The claimant is stated in the case to have occupied "part of a house, consisting of two rooms which were not structurally separate from the rest of the house." That seems to me to be a conclusive finding that the whole building was a house, and that what the claimant occupied was part of a house. He occupied two rooms,

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in which he and his family lived entirely, sleeping, and cooking, and having their meals therein; that is to say, the claimant in one sense lived entirely in these two rooms. The next paragraph in the case states that the landlord did not live on the premises or retain any control over them; but the other rooms in the house were let out in a similar manner to other tenants. The case further states that the two rooms were connected by a staircase and passage which were used by the claimant in common with the persons who occupied the rest of the house. It is obvious, therefore, that, when it is said that the claimant and his family lived entirely in these two rooms, it is not meant to say that they used no other part of the house than the two rooms. They must use the staircase and passage; and these they used in common with the other tenants. It was agreed, on the argument, that there was an outer door to the house, over which the tenants only had control. The result therefore is, that the landlord did not reside upon the premises or exercise any control over them; but that the whole house was let out in separate apartments to several tenants, all of whom used the passage and staircase in common.

The next material statement in the case is, that two rates were made in the parish during the twelve months ending the 31st of *July*, 1873, viz., in *November*, 1872, and *May*, 1873, and in both these rates the two rooms in question were rated separately from the rest of the house. The case goes on further to state that there was a former rate made in *May*, 1872, which was the last rate made before the commencement of the year ending the 31st of *July*, 1873, in which the rooms in

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question were not separately rated. If we can infer anything from these statements, it is that the rooms were rated in the usual manner, viz., that the whole of the occupiers were rated in respect of the whole house in the name of one of them "and others."

Upon these facts, notwithstanding their similarity to those in *Thompson* v. *Ward* (*a*), where the ruling of the Revising Barrister was against the claim to vote, the Revising Barrister in this case thought fit to hold that the two rooms were occupied by the voter as a separate dwelling-house, and were separately rated to the relief of the poor, and that the claimant was entitled to be registered; and the question is whether that decision is right.

The first point made is, whether the occupier of these rooms could be separately rated. It was argued that the Revising Barrister cannot look behind the rate, and that, if not appealed against, the rate is binding although the overseers had no legal power to make a separate rating of the several rooms. I must confess this is the first time I have heard that argument put forward. As far as my experience goes, the Revising Barrister has always looked behind the rate to see whether or not the party was properly rated. If it were otherwise, it would be in the power of the overseers to give or withhold the franchise at their pleasure. I therefore think it is necessary for us to look behind the rate, to see whether or not the occupier of these two rooms could be separately rated; and that depends upon the true construction to be put upon the Representation of the People Act, 1867.

(*a*) 1 *Hopw. & Colt.* 530; *S. C. L. R.* 6 *C. P.* 327.

Before I proceed to consider that matter, I will venture to state again the canon of construction which, with the concurrence of the other judges, I propounded in *Cull* v. *Austin* (*a*). "The governing rule with regard to the construction of all statutes by a Court of law administering the law, is, that the Court is bound to construe them as nearly as possible according to the ordinary received meaning of the words and ordinary grammatical construction of the phrases and sentences used in them. The Court ought not in any case to depart from such ordinary sense and ordinary grammatical construction, unless an interpretation according to both or either appears by the context to be contrary to the manifest intention of the legislature." It should seem that this rule ought to be adhered to more strictly, if possible, in the construction of the Act under consideration than in that of any other statute; for the matter must have been discussed by persons who entertained the most earnest views upon the subject, and who were not likely to fail to express what they intended to convey. The best course, therefore, it still seems to me, is, to follow as nearly as possible the words of each clause.

It is said that absurdity would arise from following the language of each of the sections of this Act literally. The matter is thus dealt with by the late Mr. Justice *Willes* in *Abel* v. *Lee* (*b*), where that very learned judge says: "No doubt, the general rule is that the language of an Act of Parliament is to be read according to its ordinary grammatical construction, unless so reading it

(*a*) 1 *Hopw. & Colt.* 756; *S. C. L. R.* 7 *C. P.* 234.

(*b*) 1 *Hopw. & Colt.* 523; *L. R.* 6 *C. P.* 371.

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would entail some absurdity, repugnancy, or injustice. One recognises that rule where the repugnance arises between the words of the section and those of some other section in the same Act, or in some other Act which is in *pari materiâ* with it. But I utterly repudiate the notion that it is competent to a judge to modify the language of an Act of Parliament in order to bring it in accordance with his views as to what is right or reasonable." It seems to me, therefore, that the proper canon of construction for this statute is, to abide as nearly as may be by the precise words of each section and of every part of every section of it. I also think that one of the most important duties of this Court whose jurisdiction over this particular subject is exclusive, and whose decisions thereon are final, and whose personality varies from time to time, is, to follow loyally, as I once ventured to express it (*a*), all the preceding decisions, and that the action of the Court in its exercise of this jurisdiction will be much impaired if this be not steadily kept in mind.

Now, before the passing of the Representation of the People Act, 1867, there were two distinct sets of circumstances in parliamentary boroughs with regard to rating. There were parliamentary boroughs where statutes were in force under which in certain cases the owners of houses were rated instead of the occupiers; and there were boroughs in which no such statutes were in force. In the latter case, the owner might be rated, provided he occupied any part of the premises; or, if the whole house were let to separate tenants, as here,

(*a*) *Webster* v. *Overseers of Ashton under-Lyne* (*Orme's Ca.*) 80; S. C. L. R. 8 C. P. 299.

then, according to the decision of this Court in *Stamper* v. *Overseers of Sunderland* (*a*), the several occupiers might be rated under the statute of *Elizabeth*; and, if the occupiers were rated, they might be rated in either of two ways, that is to say, either jointly for the whole house, or separately in respect of the several apartments occupied by them respectively. So, in parliamentary boroughs where the Small Tenements Act (13 & 14 *Vict.* c. 99) was in operation, the owner might be rated, and to the full rate, provided he occupied part of the house, the same as any other occupier might be, and the owner and the tenant might be jointly rated, or the owner only. But there was another way in which the owner might be rated instead of the occupier, although he did not occupy any part of the premises himself, viz., under an order of the vestry, and in that case it was for a composition rate only.

That being the state of things as to rating at the time of the passing of the Representation of the People Act, 1867, the provision contained in sect. 7 of that Act was introduced into it. A particular interpretation was put by this Court upon that section in *Stamper* v. *Overseers of Sunderland* (*a*). Mr. *Kingdon* has observed that the decision in that case was not satisfactory, and that, at all events, it was not an authority in the present case, because it was only an appeal against a rate. It is true it was an appeal against a rate; but it is manifest that the question was raised as a question of parliamentary franchise, and it was so treated by all the judges who took part in the decision; and therefore

(*a*) *L. R.* 3 *C. P.* 388.

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it would not be loyal to disregard it merely because it was not in form a case reserved by a Revising Barrister. The real decision there, as to the interpretation of sect. 7 of 30 & 31 *Vict.* c. 102, was that the enactment in that section that, "where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor-rate," was to be treated as an exception to the former part of the section of something which otherwise would have been within it. Now, the former part of the section is a negative as well as an affirmative enactment. The first sub-section provides that, "after the passing of this Act, no owner of any dwelling-house or other tenement situate in a parish either wholly or partly within a borough"—which, by the interpretation clause, sect. 61, means all parliamentary boroughs—"shall be rated to the poor-rate instead of the occupier, except as hereinafter mentioned." Then comes an affirmative enactment—"The full rateable value of every dwelling-house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, shall be entered in the rate-book." Unless the case be one to which the former part of the sentence in subs. 1 can be applicable, the exception to it cannot apply, and therefore it would seem to follow that sect. 7 cannot be applied to any parliamentary borough in which, at the time of the passing of the Representation of the People Act, 1867, there was no statute in force by which the owner could be rated. If I differed from *Stamper* v. *Overseers of Sunderland* (*a*), I should still

(*a*) *L. R.* 3 *C. P.* 388.

adhere to it. But I entertain a firm conviction that the decision in that case was right. It follows, therefore, that neither the 7th section of the Representation of the People Act, 1867, nor the case of *Stamper* v. *Overseers of Sunderland* (*a*) applies to the present case, and consequently that the occupiers of these rooms could legally have been separately rated.

The next point is, whether the occupier of these two rooms, assuming that he might have been and was separately rated to all rates made for the relief of the poor, can be considered to fulfil the condition as to rating given with reference to the definition of "dwelling-house" in sect. 61 of the Representation of the People Act, 1867. This part of sect. 61 was naturally and necessarily contrasted with sect. 3. It becomes necessary, therefore, to see what is the true construction of sect. 3. It is divided into four sub-sections, the last three of which are those which are material for the present purpose. By subsect. 2 it must appear that the voter "is, on the last day of *July* in any year, and has during the whole preceding twelve calendar months been, an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough." It is obvious that the occupation of the dwelling-house must have existed during the whole twelve months. The 3rd sub-section is "has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises." The 4th sub-section is, "has, on or before the 20th day of *July* in the same year, *bonâ fide* paid an equal amount in

(*a*) 3 *L. R.* 3 *C. P.* 388.

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the pound to that payable by other ordinary occupiers in respect of all poor-rates that have become payable by him in respect of the said premises up to the preceding 5th day of *January*." Now, an interpretation has been put upon that subs. 3 in the cases of *Jones* v. *Bubb* (*a*), *Abel* v. *Lee* (*b*), and *Cull* v. *Austin* (*c*). In those cases this Court came to the conclusion that, so far as subs. 3 is concerned, the voter need only be rated to such rates as were made during the qualifying year, and that he need not have been rated to any rate made before the commencement of the qualifying year. In the first of these cases, where the rate was signed by the overseers before, but not allowed by the justices until after, the commencement of the qualifying year, it was held that the voter need not be rated to it, the words of subs. 3, "all rates made" during the time of such occupation, meaning all rates *completely* made within the year of occupation. In *Abel* v. *Lee* (*b*), the claimant had been rated in a rate made before the commencement of the qualifying year, from the payment of which he had been excused by the justices under 54 *Geo.* 3, c. 170, s. 11 during the qualifying year; and this Court, having only in that case to consider subs. 4 of sect. 3, came to the conclusion that it differed from subs. 3, because it was not in terms limited to the preceding twelve months; and they held themselves bound to follow the exact words of subs. 4, and accordingly decided that, inasmuch as the claimant had not "on or before the 20th day of *July* in the same year *bonâ fide* paid an equal amount in the

(*a*) 1 *Hopw. & Colt.* 128; *S. C. L. R.* 4 *C. P.* 468.

(*b*) 1 *Hopw. & Colt.* 515; *S. C. L. R.* 6 *C. P.* 365.

(*c*) 1 *Hopw. & Colt.* 741; *S. C. L. R.* 7 *C. P.* 227.

pound to that payable by other ordinary occupiers in respect of all poor-rates that had become payable by him in respect of the premises up to the preceding 5th day of *January*," he was not entitled to be upon the register. In *Cull* v. *Austin* (*a*), the claimant had been rated to several rates made both before and after the commencement of the qualifying year. He had paid all the rates that were payable by him during the qualifying year; but he had, four or five years before, been excused by the justices from the payment of a rate which had been imposed upon him in respect of the premises; and it was contended, upon the authority of *Abel* v. *Lee* (*b*), that he could not be qualified unless he paid that rate also. But the Court, after anxious consideration, came to the conclusion that it was not necessary that the claimant should, in order to qualify him as a voter, have paid that rate, but that it was enough that he should have paid all the rates which were payable by him in respect of the premises during the twelve months previous to the 5th *January* in the qualifying year. It seems to me, therefore, that these cases have decided that there is a difference between the 3rd and the 4th sub-sections of sect. 3 of the Representation of the People Act, 1867; that subs. 3 applies only to the question of the claimant being rated; and that subs. 4 applies to the rates which must be *paid* by the claimant. The conclusion I have come to is, that, if the decision of this case had depended upon the rating requirements in sect. 3 alone, there is nothing upon the face of it to show that the claimant was not entitled to be registered, because, with respect to the

(*a*) 1 *Hopw. & Colt.* 741; *S. C. L. R.* 7 *C. P.* 227.

(*b*) 1 *Hopw. & Colt.* 515; *S. C. L. R.* 6 *C. P.* 365.

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rate made before the commencement of the qualifying year, for anything that appears, the claimant may have been, and he must be taken to have been either jointly rated to it with the other occupiers, or not to have been rated to it at all, and there is no finding in the case that it was not paid by him in point of fact. Therefore, irrespectively of the kind of occupation necessary to satisfy the definition in sect. 61 of the statute, there is nothing to show that the claimant might not have satisfied all the requirements of the Act in respect of rating.

Now, what is the meaning of sect. 61 as to the definition of a "dwelling-house?" The words are, "*Dwelling-house* shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor." Obviously, two things are necessary to make that which *ex hypothesi* is not a "dwelling-house," but only a part of one, a dwelling-house within the statute. It must be separately occupied as a dwelling, and it must be separately rated to the relief of the poor. It was observed by Mr. *Kingdon* that these words cannot be taken in their literal sense, because, strictly speaking, a house or a part of a house cannot be rated, but the occupier is rated in respect of his occupation. That is strictly true; but the expression is commonly used, and has a known meaning. Then, if that definition be read into subs. 2 of sect. 3, that sub-section would, in the cases to which the definition of "dwelling-house" in sect. 61 would be applicable (for it is only in certain cases, that is to say, where what has been occupied is *part* of a dwelling-house, that the definition is required), stand thus,—"Is, on the last day of July in any year, *and has during the whole of the preceding twelve calendar*

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months been, an inhabitant occupier, as owner or tenant, of any part of a house within the borough occupied as a separate dwelling, *and separately rated to the relief of the poor*." The definition is to stand in the place of the thing occupied; and, as that must be an occupation of the whole of that thing during the whole of the year preceding the last day of July, it follows that, according to the grammatical construction of the words, the whole, including the separate rating, must have existed during the whole year. In accordance with the view expressed by *Montague Smith*, J., in *Stamper* v. *Overseers of Sunderland* (*a*), and the rule of construction before laid down, I am of opinion that it is not open to the Court to say that "rated" means "liable to be rated," or that it does not mean that the rating shall have been during the whole of the qualifying year. It may be that this construction may lead to an insensible conclusion. Following the example of the late Mr. Justice *Willes*, I decline to decide whether it will do so or not. I decline to say that the statute means anything else than what it says. I think it was necessary that the person occupying these rooms should have been separately rated in respect of them during the whole of the qualifying year; and on this point I agree with my brother *Honyman* that, for this year at least, the claimant is not entitled to be put upon the register.

But, with regard to the remaining point, after having anxiously considered whether the view I took in *Thompson* v. *Ward* (*b*) was right or not, I find myself unable to alter the conclusion I there came to. Upon reading it

(*a*) *L. R.* 3 *C. P.* 403, 404.

(*b*) 1 *Hopw. & Colt.* 530; *S. C. L. R.* 6 *C. P.* 327.

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again, and reading with the utmost attention the judgments of all the judges who took part in the decision of *Stamper* v. *Overseers of Sunderland* (*a*), and more particularly that of *Montague Smith*, J., it seems to me to be clear that every one of them was at that time of opinion that the 61st section of the Representation of the People Act, 1867, had no effect upon the decision of this Court in *Cook* v. *Humber* (*b*). I think it must come either to what the late Mr. Justice *Willes* said in *Thompson* v. *Ward* (*c*), viz., that the 61st section has no effect at all on the meaning of "dwelling-house," but leaves the matter as it stood before the passing of that Act, and, when it applies, it applies only to the case of chambers in the Inns of Court, or to flats as in *Victoria Street*, and that, where the occupation is such as in the present case, it does not apply at all, or to what I myself said in *Thompson* v. *Ward* (*d*). After all the consideration I have again given to the statute, I adhere to what I said in that case, and am of opinion that, even if the rating was for a sufficient period, the claimant is not entitled to the franchise, on the ground that part of what he used as a dwelling he used in common with the other occupiers. I therefore think the decision of the Revising Barrister was wrong.

KEATING, J. I also have been unable to write a judgment in this case. It was, however, less necessary to do so, inasmuch as substantially I agree with the

(*a*) *L. R.* 3 *C. P.* 388.

(*b*) *K. & G.* 413; *S. C.* 11, *C. B. N. S.* 33.

(*c*) 1 *Hopw. & Colt.* 572; *S. C. L. R.* 6 *C. P.* 352.

(*d*) 1 *Hopw. & Colt.* 552; *S. C. L. R.* 6 *C. P.* 338.

judgment delivered by my brother *Denman*. Still, there are one or two circumstances connected with the case to which I should wish shortly to refer. The inconvenience which has resulted from the present state of the decisions upon the main point involved in this case is much to be regretted.

Before the passing of the Representation of the People Act, 1867, there was no dispute that the franchise in respect of occupation could not be obtained except by the occupation of a *whole* house. The 27th section of 2 *Will.* 4, c. 45, gives the vote in respect of a "house," which, according to the decisions, meant a whole house. What constituted a whole house was from time to time the subject of much discussion; but nobody doubted that the qualification must be a whole house. That discussion gave rise to the doctrine of "structural severance,"—a doctrine the most unfortunate that ever was broached. No one can doubt that who looks at the very elaborate judgment of *Erle*, C.J., in *Cook* v. *Humber* (*a*). That very eminent judge thought he had accomplished the definition of "structural severance." But if any lawyer read that case and the subsequent case of *Henrette* v. *Booth* (*b*), and can reconcile the two decisions, I must confess that he has more acuteness than I possess. It is notorious that the subject has occupied the attention of the Court as much as any that has ever been agitated.

Then came the Representation of the People Act, 1867. It is not disputed that that Act intended to give the franchise to the occupiers of something dif-

(*a*) *K. & G.* 413; *S. C.* 11 *C. B. N. S.* 33.
(*b*) *Hopw. & Ph.* 23; *S. C.* 15 *C. B. N. S.* 500.

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ferent from a whole house. I entirely agree with my brother *Brett* in the canon of construction which he lays down. Applying that here, it seems to me that, when the Legislature say that the franchise may be acquired by the occupation of part of a house, they must mean something different from a whole house. It is with much diffidence and hesitation that I dissent from the view taken by the late Mr. Justice *Willes* in *Thompson* v. *Ward* (*a*). But I prefer adhering to the words of the Act. The subject of occupation to confer the franchise must be separately occupied and separately rated. The Legislature intended that if the occupier of part of a house has been separately rated for a given time and has paid the rates, he shall be registered. It must be presumed to have been known to the Legislature that houses which are let out in separate apartments must have a common staircase. Mr. *Lopes* has contended that if the claimant uses anything in common with other tenants, he does not separately occupy a part of a house. I must confess I am unable to follow that argument. I see nothing in the Act to warrant the inference that a man cannot occupy separately a room or rooms merely because he uses the staircase in common with others. He occupies the rooms, not the staircase. His user of that in common with the other tenants cannot interfere with his rights as the occupier of part of a house. If it be necessary that the occupation should be so separate and distinct that there shall be nothing used in common, what would become of the franchise in the vast majority of cases?

Then the claimant must be separately rated. I sup-

(*a*) 1 *Hopw. & Colt.* 530; *S. C. L. R.* 6 *C. P.* 327.

pose we may assume that, though this particular parish was not under the operation of the Small Tenements Act at the time of the passing of the Representation of the People Act, 1867, the greater part of England was. As I read the case of *Stamper* v. *Overseers of Sunderland* (*a*), it amounts to this, that no man can be separately rated for part of a house in any place in which, at the time of the passing of the Representation of the People Act, 1867, the Small Tenements Act, 13 & 14 *Vict.* c. 99 (or some local Act to the same effect), was in force. If so, what becomes of the franchise? You shall have the franchise if you separately occupy a part of a house and are separately rated in respect of it: but, if neither be practicable, what becomes of the franchise? If the Legislature meant that the party could not be separately rated in respect of his occupation of part of a house unless the subject of occupation had been separately rated at the time of the passing of the Representation of the People Act, 1867, upon whom is the franchise conferred? I must confess I do not see my way to a solution of the difficulty.

With reference to the construction of "dwelling-house," in subs. 2 of sect. 3 of the Representation of the People Act, 1867, I agree with that put upon it by my brother *Denman*; and I also agree that the words "and separately rated to the relief of the poor," in sect. 61, are to be read along with subs. 3 of sect. 3, which applies to rating, and not merely with subs. 2, which applies to occupation. I feel the full force of what has been said by my brother *Brett*, and which had been very forcibly put before by the late Mr. Justice *Willes* in

(*a*) 3 *L. R. C. P.* 388.

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Abel v. *Lee* (*a*), that, if the Legislature says a thing shall be, we are bound to give effect to it. But I hold it to be an essential canon of construction, that, if the words are susceptible of a reasonable and also of an unreasonable construction, the former construction must prevail. I cannot see that any violence will be done by reading the words of sect. 61, "and separately rated to the relief of the poor" (which it is conceded is an inapt mode of expressing it), as if they were "and separately rated to the relief of the poor in respect of such separate occupation." Therefore I quite agree with the view taken by my brother *Denman* of that section.

With respect to the case of *Stamper* v. *Overseers of Sunderland* (*b*), I agree with my brother *Brett* that this case is excepted out of it by reason of the Small Tenements Act not having been applied to the city of *Exeter* at the time of the passing of the Representation of the People Act, 1867. I find that that case has excited considerable discussion. Mr. *Davis*, in his book on the Law of Registration and Elections (*c*), discusses that case, and expresses his regret (in which I entirely concur) that the Court felt bound by the language of sect. 7 of the Representation of the People Act, 1867, to hold as they did. "It seems a pity," he says, "that the Court could not see their way to holding that the exception applied to a state of things whenever it might exist and so long as it existed, and that this state of things should be the fact of a dwelling-house, in its ordinary sense, being wholly let out as described, and not in fact separately rated, although it may be separately rateable;

(*a*) 1 *Hopw. & Colt.* 523; *S. C. L. R.* 6 *C. P.* 371.
(*b*) *L. R.* 3 *C. P.* 388. (*c*) Pp. 234, 235.

that, in such a case, and so long as there should be no separate rating, the owner should be rated (*i.e.* should be rateable), and could not object to the particular rate; but leaving the overseers to rate separately if they thought fit, or the tenants to demand to be rated if they could establish the right to be separately rated." It is not, however, necessary upon the present occasion to examine critically the reasons for that decision. Should it ever come under consideration again, it may be a question how far this Court, whose jurisdiction as to registration matters is exclusive, may hold itself to be irrevocably bound by that case to its full extent. I quite agree with my brother *Brett* that the judges who decided that case had their attention expressly called to the consequences to which it might lead in cases under the Registration Acts.

As to the question of rating, I cannot say that the case has been at all improperly stated. I assume that the Revising Barrister was satisfied that all the rates which the parish officers were entitled to receive in respect of these premises had been paid; and therefore it was not necessary for him to state more upon the subject than he has stated. Nor do I think that the Revising Barrister was precluded from exercising his judgment on the case of *Thompson* v. *Ward* (*a*), seeing that there was no decision of this Court, though for myself I must say I adhere to the opinion which I there expressed.

Upon all the other points, I fully adopt the judgment delivered by my brother *Denman*.

DENMAN, J. With regard to *Stamper* v. *Overseers of*

(*a*) 1 *Hopw. & Colt.* 530; *S. C. L. R.* 6 *C. P.* 327.

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Sunderland (*a*), I wish to add that I entirely agree with my brother *Brett* that that case does not apply where the Small Tenements Act was not in force at the time of the passing of the Representation of the People Act, 1867.

HONYMAN, J. I also would add that I must not be taken as disagreeing with my brother *Brett* on the points on which I have not touched.

KEATING, J. The Court being equally divided, the appeal drops.

Attorneys—For Appellant, *Philbrick*.
For Respondent, *Coode, Kingdon, & Cotton*, agents for *Flood, Exeter*.

(*a*) *L. R* 3 *C. P.* 388.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

UNDER THE STAT. 6 VICT. c. 18,

IN

MICHAELMAS TERM, 1874,

IN THE

THIRTY-EIGHTH YEAR OF QUEEN VICTORIA.

Fox, Appellant; DALLY, Respondent.

1874.
Nov. 17.

Sec. 2 of 31 & 32 *Vict.* c. 76, enacts (with

THE case stated:—At a Court held on the 25th day of September, 1874, by the Barrister appointed to revise the lists of voters for the borough of *Devizes*, an exception not here material) that "every member of the permanent staff of the regular militia when disembodied *shall reside* in such places as shall be sanctioned by the Secretary of State for War," and this section, though repealed as an enactment, has the same effect as if its provisions were embodied in a royal warrant. The respondent, a sergeant on the permanent staff of the W. Militia, occupied, as such, a house (forming part of the buildings so sanctioned) close to the premises where the arms, accoutrements and clothing of the corps were stored, and so built for the accommodation of the men employed in looking after the stores. The house was assigned to the respondent by his commanding officer, but he was liable to be turned out of it at any moment, and if he left the house without his commanding officer's permission it would be a breach of discipline, for which he would probably be dismissed from the service. Formerly 4*d.* per day had been allowed as lodging money, and a deduction of 2*s.* 4*d.* per week was now made from the respondent's pay as occupier of the house; but he would not receive it if for his own convenience he resided elsewhere. The case found that the respondent could perform his duties equally well if he were living elsewhere, which he might do by his commanding officer's permission. Held (reversing the decision of the revising barrister) that the respondent did not occupy as tenant within sec. 3 of 30 & 31 *Vict.* c. 102.

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John Russell Fox, a voter for the said borough, objected to the name of *Edward Dally* being retained upon the lists of persons entitled to vote, in respect of his occupation of a house in the parish of *Rowde*, in the said borough

The facts of the case were as follows:—*Edward Dally* is a sergeant on the permanent staff of the *Wiltshire* Militia, and as such, occupies a house in the *Bath Road, Rowde*, in the borough of *Devizes*.

This house, with others similar to it, was built at the same time others were purchased by the Justices of the Peace for the county of *Wilts* under the provisions of the Militia Law Amendment Act, 1854, 17 & 18 *Vict.* c. 105.

The said houses stand in close proximity to the buildings and premises in which the arms, accoutrements, and clothing, of the *Wiltshire* Militia are stored.

They are separate houses containing sufficient accommodation for the families of the sergeants who occupy them, and the wives and families of the sergeants live there with them.

In support of his objection, the appellant referred to the second section of the Militia Pay Act, 31 & 32 *Vict.* c. 76, which enacts, "that except when employed as thereinafter provided, every member of the permanent staff of the regular Militia when disembodied, shall reside in such places as shall be sanctioned by the Secretary of State for War, and every such member shall forfeit his pay for any period during which he shall be absent, except when employed as thereinafter provided, or when absent by leave of the Colonel or Commandant of the regiment, battalion, or corps, which

leave shall not, except in case of certified sickness, extend beyond three calendar months in one year, nor to a greater proportion than one-third of the non-commissioned officers and men at the same time."

Under sec. 3 of the Militia Law Amendment Act, 1874, the above Act has ceased to be of any force as an Act of Parliament, but has the same effect as if Her Majesty had embodied the provisions thereof in a Royal Warrant.

The buildings and quarters including the houses occupied by the respondent and twenty-three other persons whose names appeared in the schedule to the case, have been duly sanctioned by the Secretary of State for War.

Upon the appointment of the respondent as a sergeant, the house which he occupies was assigned to him by the commanding officer of the regiment. It is an advantage to him to live there, as he could get no other house of equal size for the same rent.

He could perform the duties required of him equally well if he were living elsewhere, which he might do by the permission of the commanding officer.

One of the sergeants by such permission does live elsewhere, and pursues the avocation of a market gardener, besides fulfilling his military duties.

Two shillings and four-pence per week is deducted out of the pay of the occupier of each cottage, but if he resides elsewhere he does not receive the said sum of 2*s.* 4*d.* extra.

Before the new buildings were erected each sergeant was allowed 4*d.* a day lodging money, which has not been allowed since; if any sergeant were billetted elsewhere by reason of there being no house for his

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use, he would be allowed the sum of 4*d.* a day lodging money.

When appointed by his commanding officer to a particular house, should he leave that house without asking permission of his commanding officer it would be a breach of discipline, for which he probably would be dismissed from the service.

The commanding officer would have the power of turning any occupier of one of these buildings out.

The grates, boilers, and other fixtures in the houses are the property of the county of *Wilts*.

All repairs are done by the county.

The duties of the sergeants are to look to the clothing, arms, accoutrements, and stores required by the militia during the whole year.

They are liable to be engaged every day on this duty if ordered.

The sergeants parade at the stores twice a week and are drilled there.

At different times a sergeant has resided out of these buildings by leave of the commanding officer.

Serjeant *Arter* above-mentioned as being away from the buildings does not receive any allowance for lodging money.

Although the said sergeant *Arter* resides away from the stores he can, as an individual, perform all the duties required of him.

No sergeant could exchange quarters with another without the leave of the commanding officer or the adjutant.

The cottages were expressly built adjoining to the stores for the accommodation of the men employed in looking after them and the safe custody of the said stores.

The rate books for the parish of *Rowde* were produced and therein the name of the respondent, *Edward Dally*, appears thus :—

Name of Occupier.	Name of Owner.	Description of Property.	Name or Situation of Property.
Edward Dally.	County.	Buildings and Land.	*Bath Road, The Stores.*

But the rest of the spaces are left blank, no assessment having been made on the premises, and no rate has ever been paid (because never asked for), either by *Edward Dally*, as occupier, or by the county, as owner, in respect of the said premises.

It was therefore further contended on behalf of the appellant that the said *Edward Dally* did not occupy as owner or tenant within the meaning of 2nd William IV. cap. 45, (or the Representation of the People Act, 1867), and that if he did so occupy he ought to have been rated and to have paid rates in respect of the premises occupied by him.

The Revising Barrister decided :—

First—That the said *Edward Dally* did occupy as tenant within the meaning of the Statute.

Secondly—That the premises he so occupied being exempted from the payment of rates (as they are under the Militia Act of 1854 by which it is specially enacted that no place provided for the purpose of keeping militia stores, nor any buildings or premises appurtenant thereto shall be liable to be assessed to any county, borough, parochial, or other rates or assessments), the said *Edward Dally* was, although not rated, entitled to be on the list notwithstanding.

Other appeals were consolidated.

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Should the decision of the superior court be against retaining the said names upon the register of voters for the borough of *Devizes* the register was to be amended by erasing the name of the said *Edward Dally* and the other persons in the schedule.

Sir *Henry James*, Q. C. (*Charles* with him). The first question here arises under sec. 3 of the Representation of the People Act, 1867, and is, whether the respondent occupies as tenant, for it is quite clear he does not occupy as owner. It is submitted as equally clear that he does not occupy as tenant, for he has not a tenant's independent position. He occupies a house no doubt, but it has been assigned to him by his commanding officer for the discharge of his duties, and he cannot leave it without that officer's permission. The leaving without permission would, as the case finds, be a breach of military duty, for which the respondent would in all probability be dismissed from the service. It is true that if there were no house available, and the respondent was in consequence billetted elsewhere, he would receive an additional sum of 4d. per day, making 2s. 4d. per week; but if the permission to reside elsewhere were accorded to him for his own convenience, the 2s. 4d. would not be allowed. As regards the authorities, no general principle is to be found in them, which can be regarded as governing all cases that will arise; but certain tests have been established, and every test that has been thought material will be found destructive of the vote in the present instance. In *Hughes* v. *the Overseers of Chatham* (*a*), *Tindal*, C. J., in delivering

(*a*) 1 *Lutw.* 51, 70; *S. C.*, 5 *M. & G.* 54, 78.

judgment said, "It may be that a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them; it may be that he is not *permitted* to occupy, as a reward, in the performance of his master's contract to pay him, but *required* to occupy in the performance of his contract to serve his master. The settlement cases, cited in argument, established and proceeded on this distinction. We think it applicable to the present question; and, as there is nothing in the facts stated, to show that the claimant was *required to occupy the house for the performance of his services*, or did occupy in order to their performance, or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services; and as the case expressly finds that he had the house as part remuneration for his services, we cannot say that the conclusion at which the Revising Barrister has arrived is wrong." There, no doubt, the vote was allowed, but in allowing it the distinction which is relied on here was expressly insisted on, viz., that the claimant was not required to occupy the house for the performance of his service. And in the subsequent case of *Dobson* v. *Jones* (*a*) the vote was expressly disallowed on that very ground. The remarks of *Tindal*, C. J., in *Hughes* v. *the Overseers of Chatham* (*b*), are in point as to the deduction of salary in consideration of the allowance of a house. *Tindal*, C. J., there said: "The fact of having a lower salary in consequence of being allowed a house, though not immaterial, is by no means decisive; for such a fact might exist in a

(*a*) 1 *Lutw.* 105; *S. C.*, 5 *M. & G.* 112.
(*b*) 5 *M. & G.* 79.

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case in which the house was occupied for the purpose of the service, and not in the character of tenant." *Clark* v. *the Overseers of Bury St. Edmunds* (*a*) is also in the appellant's favour. No doubt the circumstance of a person being *required* to reside is not in itself conclusive, as was pointed out by the Court in the case last cited, since a demise might be made to a tenant on the express terms that he shall reside on the farm he occupies, and he would none the less be tenant of the farm. But here the respondent is required to reside in the house he occupies, as part of his duty to superior authority, and in performance of his duties. The finding that the respondent could perform his duties equally well if he were residing elsewhere, does not affect the case. In *Bridgwater* v. *Durant* (*b*), the case of the lay clerks at *Windsor*, it was found by the case that a lay clerk could perform all his duties as lay clerk without inhabiting the house he occupied, but it was held nevertheless that he did not occupy as tenant. It is true that in all the cases that have been cited the decision of the Court has been in conformity with that of the Revising Barrister; but the case of *Norris* v. *Pilcher* (*c*) shows that, although it is for the Revising Barrister to decide questions of fact, yet if he state the facts and submit the grounds of his decision for the opinion of the Court, the Court will then review his decision.

Lopes, Q. C., for the respondent, was called on to argue the first point.—The question is, is the respondent's occupation that of a servant, or a tenant?

(*a*) *K. & G.* 90; *S. C.*, 1 *C. B. N. S.* 23.

(*b*) *K. & G.* 377; *S. C.*, 11 *C. B. N. S.* 7.

(*c*) 1 *Hopw. & Colt.* 173; *S. C.*, *L. R.* 4 *C. P.* 417.

[Lord COLERIDGE, C. J. It does not follow that because an occupation is not as servant, that it is therefore as tenant.]

The Revising Barrister is the judge of facts, and he has expressly found here that the occupation was an occupation as tenant. The Court will not review his decision on a question of fact.

[Lord COLERIDGE, C. J. In *Hughes* v. *The Overseers of Chatham* (*a*), *Tindal*, C. J., said, "If the question is whether, under a given state of facts, the legal relation of landlord and tenant exists, that is surely a question of law."]

In every case that has been decided where this question has come before the Court, the Court has uniformly upheld the Revising Barrister's decision. Further, the Revising Barrister was right. The true test in these cases is, whether in order to discharge the duties imposed on him it is necessary that the person seeking qualification should reside on the premises, and not merely whether it is convenient that he should do so. *Hughes* v. *The Overseers of Chatham* (*b*) is almost identical with the present case. There as here it was not necessary, though no doubt convenient, that the master ropemaker should reside on the premises; there as here the house was occupied in part remuneration for services. In both cases the Revising Barrister found that the occupation was an occupation as tenant. *Dobson* v. *Jones* (*c*) is distinguishable, for there the Revising Barrister drew the inference of fact, that it

(*a*) 5 *M. & G.* 63.
(*b*) 1 *Lutw.* 51; *S. C.*, 5 *M. & G.* 54.
(*c*) 1 *Lutw.* 105; *S. C.*, 5 *M. & G.* 112.

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was necessary to the discharge of his duties that the surgeon should occupy. But the inference of fact was for the Revising Barrister. It was for him to apply the tests that the cases indicate, and the Court will not look behind his decision where he has applied them fairly. The Court will surely not hold that the mere circumstance of a claimant being required to reside on the premises furnishes in itself a conclusive test of what constitutes the relation of landlord and tenant, and does away with every other consideration.

[DENMAN, J. The case here finds that "the cottages were expressly built adjoining to the stores for the accommodation of the men employed in looking after them, and the safe custody of the stores"; so that the object of placing the respondent there was the performance of his duty.]

The case does not find that residence was necessary to the performance of the duties. On the contrary, it distinctly finds that it was not, for the respondent might have performed his duties equally well residing elsewhere.

[DENMAN, J. To reside on the premises was part of his duties, unless permitted by superior authority to reside elsewhere.]

The case of *Bridgwater* v. *Durant* (*a*), and the judgment of *Erle*, C. J., therein, shews that the question is one, not of law, but of fact. The case itself merely decided that the statutes not being produced before the Revising Barrister, there was no sufficient evidence before him to enable him to decide what the

(*a*) *K. & G.* 377; *S. C.*, 11 *C. B. N. S.* 7.

occupation was, and on that ground the vote was disallowed. *Collier* v. *King* (*a*) is also an authority that the decision of the Revising Barrister must stand, unless it was a matter of *necessary* inference from the facts that the occupation was not an occupation as tenant.

Sir *Henry James*, Q.C., was not heard in reply.

Lord Coleridge, C. J. I am of opinion that the decision of the Revising Barrister was wrong, and must be reversed. Of the two questions submitted to us the first only has been fully argued, and our decision on it being in the appellant's favour, it becomes unnecessary to consider the second question.

The respondent is a sergeant on the permanent staff of the *Wiltshire* Militia. As such, he occupies a house in *Devizes*, standing in close proximity to the premises in which the arms, accoutrements, and clothing of the *Wiltshire* Militia are stored, and built for the accommodation of the men employed in looking after the stores, and for their safe custody. It is true, no doubt, that such an occupation may be an occupation as tenant, but to see whether it is so we must look at the facts. By sect. 2 of the Militia Pay Act (31 & 32 Vict. c. 76), "except when employed as thereinafter provided every member of the permanent staff of the regular militia, when disembodied, *shall reside* in such places as shall be sanctioned by the Secretary of State for War." The respondent's house is one of the places so sanctioned; if the respondent were to leave it without permission, it would be a breach of discipline for which he would

(*a*) *K. & G.* 385; *S. C.*, 11 *C. B. N. S.* 14.

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probably be dismissed from the service, and his commanding officer has the power of turning him out of the house at any moment. It appears to me that no incident of the tenancy which the statute contemplates here exists. It is not necessary for us to decide what the respondent's occupation is. It is enough that he does not occupy either as owner or tenant, and that the occupation is not such as to confer a vote under the statute.

The question, however, does not come before us without authority. There are two well-known and governing cases, decided before the same judges, viz., *Hughes* v. *The Overseers of Chatham* (*a*) and *Dobson* v. *Jones* (*b*), the judgments in which have always been considered as laying down principles for ascertaining the true tests of this kind of occupation; and although they were decided before the passing of the Representation of the People Act, 1867, the words on which they were decided were substantially the same as those here employed. In the former case, the master ropemaker at *Chatham* Dockyard was held to occupy as tenant a house in the yard, which he occupied rent free as part remuneration for his services. In the latter case, the surgeon of *Greenwich* Hospital was held not to occupy as tenant a house at the infirmary in the Hospital in which, by the regulations of the Hospital, he was required to reside. The latter case is the more important here—not only as being the one more in point, but because *Tindal*, C. J., in delivering the judgment of the Court, pointed out how *Hughes* v. *The Overseers of Chatham* was distin-

(*a*) 1 *Lutw.* 51; *S. C.*, 5 *M. & G.* 54.
(*b*) 1 *Lutw.* 105; *S. C.*, 5 *M. & G.* 112.

guishable, while again insisting on the distinction that had been previously drawn between a *permissive* and a *required* occupation. The language of the Chief Justice is as follows (*a*):—"In delivering our opinion upon a former case, in which *Hughes* was the appellant and *The Overseers of the Parish of Chatham* were the respondents, we laid down at some length the principle upon which we thought the class of cases to which the present appeal belongs ought to be decided; and we drew the distinction between those cases where officers or servants in the employ of Government are *permitted* to occupy a house belonging to the Government as part remuneration for the services to be performed, and those in which the places of residence are selected by the Government, and the officers or servants are *required* to occupy them, with a view to the more efficient performance of the duties or services imposed upon them. Upon that occasion we declared our opinion to be, that those officers or servants who fell within the first description might properly be considered to occupy as tenants, although the residence was allotted to them as such officers and servants, and although they might—if such residence had not been allowed to them—have had an additional allowance for lodging-money; whilst, at the same time, we stated that the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made with a view, not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual

(*a*) 5 *M. & G.* 121.

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performance of the service required from such officer or servant." The judgment then proceeds to detail the facts, upon which the court decided that the case fell within the latter category, and was excluded from the former, which are thus stated by the Chief Justice:—

"It is found by the case that the appellant is the surgeon of *Greenwich* Hospital; that the house which he occupies is in the infirmary; that he occupies it as such surgeon. Now the nature of the office of surgeon to the Hospital is such, that a residence in some known and certain dwelling may reasonably be required for the duties of his office. But it is further found that he was placed in it when he was first appointed (nineteen years ago) and that he has continued to occupy it ever since, and that it is the house appropriated to the surgeon for the time being. And lastly it is found by the Revising Barrister, that, by the regulations established by the Lords Commissioners of the Admiralty, the officers of the Hospital having apartments are to inhabit those assigned to them, and that no exchanges or other appropriations are to be made without permission." These are the facts which were held to bring the case within the second category, viz., that in which the Court considered there was no occupation as tenant. What then are the facts here? The respondent's place of abode has been selected by the government; he has been ordered, not *permitted*, to occupy it; he cannot leave it without permission, and if he does so he is liable to be dismissed from the service; and he may also be turned out at any moment by his commanding officer. I am unable to see any feature in the case which distinguishes it from *Dobson* v. *Jones* (*a*). The respondent's counsel has

(*a*) 1 *Lutw.* 105; *S. C.*, 5 *M. & G.* 112.

insisted that there is a distinction, because the Revising Barrister has found as a fact that the respondent "could perform the duties required of him equally well if he were living elsewhere, which he might do by the permission of the commanding officer." In *Dobson* v. *Jones* (*a*) it was not found to be essential to the discharge of the duties of surgeon, that the surgeon should reside in the Hospital, and by the rules and regulations, "surgeons of hospitals, when not provided with a residence within the hospital, were to be allowed fifteen shillings a week lodging money;" so that there is nothing in the facts of the present case to distinguish them from the facts in *Dobson* v. *Jones* (*a*), and point to a different conclusion. In my opinion, however, if either of two incidents exists, viz., either that the occupation of the particular place is necessary for the performance of the duties to be performed, or if, though not necessary to their performance, the claimant be required by the authority appointing him to reside in order to perform his duties—either circumstance, though not conclusive, will be a most important element in arriving at a conclusion. Here the respondent is *ordered* by superior authority to reside in the house assigned to him, in order to perform his duties; and without saying that it is essential to their performance, it is manifestly convenient that he should do so.

On principle, therefore, as well as authority, I am of opinion that the respondent's occupation has none of the incidents of a tenancy; and that it has those of ownership is not contended.

(*a*) 1 *Lutw.* 105; *S. C.*, 5 *M. & G.* 112.

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On the second point we have heard no argument, and consequently express no opinion.

BRETT, J. In this case the Revising Barrister, after finding certain facts absolutely, has decided a mixed question of law and fact, subject to the opinion of this Court as to the correctness of his decision. If, therefore, the Revising Barrister's decision was wrong, it is our duty to say so, for although the burden of shewing this lies on the appellant, yet, if the decision be clearly made out to have been wrong, we ought to overrule it. The question arises under sec. 3 of the Representation of the People Act 1867, though it might equally well have arisen under sec. 27 of the 2 Will. 4, c. 45; and it can only arise when the occupier has duties or services to perform connected with his occupation of the premises. The case of *Hughes* v. *The Overseers of Chatham* (*a*) followed by *Dobson* v. *Jones* (*b*), which explained and enforced the principle of the former case, and the subsequent case of *Clark* v. *The Overseers of Bury St. Edmunds* (*c*) have established certain tests for ascertaining whether or not there be an occupation as tenant. From these cases it seems to follow that the circumstance of a person being *permitted* to occupy either by way of reward, or to enable him to perform his duties, is consistent with the occupation being an occupation as tenant, but that if the residence, though not necessary to the performance of the duties, be *required* by superior authority with the view to their performance, or if, though not specifically required, it be necessary to their performance, in either case the

(*a*) 1 *Lutw.* 51; *S. C.*, 5 *M. & G.* 54.

(*b*) 1 *Lutw.* 105; *S. C.*, 5 *M. & G.* 112.

(*c*) *K. & G.* 30; *S. C.*, 1 *C. B. N. S.* 23.

occupation is not that of tenant. What then are the facts here? The respondent is not in the situation of one who is permitted, or in other words allowed, if so minded, to occupy this house, but by the authority of the Queen he is directed and ordered to occupy it to this extent, that he may not occupy any other house without leave, and, if he does so, he is liable to be dismissed from the service. Although upon the facts found it would not have been absolutely necessary to the performance of the respondent's duties that he should reside on the premises, if he had not been required to do so by superior authority, yet, inasmuch as he was required, and with the view to the performance of his duties, the case falls within the principle of the cases that have been cited, and consequently the occupation was not an occupation as tenant. On these grounds I am of opinion that the decision of the Revising Barrister should be reversed.

DENMAN, J. I am of the same opinion. The Revising Barrister, at the end of the statement of facts, says, "I decided, first, that the respondent did occupy as tenant within the meaning of the statute." He therefore decided a mixed question of law and fact, and he asks the Court to say whether he decided rightly or wrongly. "If the decision of the Court be against retaining the name of the respondent, the register is," he says, "to be amended" by erasing it. He clearly, therefore, meant to raise the question whether, upon the facts disclosed, his decision that the respondent occupied as tenant was right or wrong. As to this the case of *Dobson* v. *Jones* (*a*) goes the

(*a*) 1 *Lutw.* 105; *S. C.* 5 *M.* & *G.* 112.

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full length of establishing that here the relation of landlord and tenant did not exist. The facts, indeed, are all one way with the exception of the finding, on which Mr. *Lopes* relies, viz., that the respondent "could perform the duties required of him equally well if he were living elsewhere, which he might do by the permission of his commanding officer." But under the circumstances of this case I think that an immaterial finding. The respondent was required to occupy this house for the purpose of performing his duties, and he had not the permission of his commanding officer to reside elsewhere, so that it was not a matter in which he had an option, but one which was compulsory as a part of his duties.

On these grounds I am of opinion that the respondent did not occupy as tenant, and, if not, the finding must be reversed, since it matters not what the occupation was, if it was not as tenant.

Decision reversed.

Attorneys—For Appellant, *Bower & Cotton*, for *Jones & Forrester, Malmesbury.*

For Respondent, *W. A. Willoughby*, for *Hulbert & Son, Devizes.*

LEWIS, Appellant; EVANS, Respondent.

Nov. 17.

W. (the place of abode of a county voter, as described on the list of voters) was two miles distant from E., the nearest post town. To prove service on the voter of a notice of objection the stamped duplicate addressed to him at W. was produced, and it was proved that the notice was sent so as to arrive in the ordinary course of post at E. at 10 a.m. on the 19th of August. There was no delivery at W., and the voter would not receive the notice unless by some accidental conveyance. Held, no evidence under 6 Vict. c. 18, s. 100, that the voter had received the notice of objection in due time.

AT a Court holden before the Revising Barrister, appointed to revise the lists of voters for the county of *Pembroke*, *Thomas Lewis* objected to the name of *Evan Evans*, of *Wern* (who did not appear to support his vote) being retained on the list of voters for the parish of *Llangohman*, in the said county. The place of abode of the said *Evan Evans*, as described in the said list of voters, was "*Wern*," which is in the said parish. The stamped duplicate of the notice of objection was produced before the Revising Barrister by the person who posted it, and it was directed as follows: "To Mr. *Evan Evans*, *Wern*." *Wern* was the place of abode of the said *Evan Evans* as described in the said list of voters.

Evidence was given before the Revising Barrister and it was to be taken as a fact, that the notice in the ordinary course of post would reach the Post Office at a place called *Efailwen* (which is the nearest Post Office to *Wern*) on the 19th day of August last, at ten o'clock in the morning. *Wern* is two miles from *Efailwen*, and there is no delivery by post at *Wern*, and unless by some private accidental conveyance, *Evan Evans* would not receive the notice. No other evidence was given as to service of the notice.

The Revising Barrister held that there was no evidence, within the meaning of sec. 100 of 6 Vict.

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c. 18, that the notice had ever been given to *Evan Evans* at *Wern*, and retained his name on the list.

The question for the opinion of the Court was, whether, under the above circumstances, there was any evidence, under sec. 100, of the notice having been given to *Evan Evans* at *Wern* on or before the 20th day of August, in the ordinary course of post.

Grantham, for the appellant. The requirements of sec. 100 of 6 Vict. c. 18 have been complied with, and the Revising Barrister should have held that the notice was proved. Sec. 100 enacts that it shall be sufficient if the notice be sent by the post, free of postage, "directed to the person to whom the same shall be sent at his place of abode, as described in the said list of voters." That requirement the objector has complied with, and the stamped duplicate was produced in Court. Sec. 100 enacts that the production of it "shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered at such place." The objector is not responsible where, through the default of the post office, the delivery of a notice of objection is delayed—*Bishop* v. *Helps* (*a*). It is true that there the notice of objection would have arrived in the ordinary course of post, but was delayed through an accident. The language of the judgment, however, is applicable here as well as there, since in the present case, as there, the objector has taken all the steps that lay in his power, and the conditions of the 100th section have all of them been complied with. In reference to that, *Tindal*, C. J., said, "We think the

(*a*) 1 *Lutw.* 353; *S. C.* 2 *C. B.* 45.

meaning of the Act is this—when all these conditions are complied with, such a sending shall be a sufficient substitute for what the 7th section required to be done, that is, a sufficient substitute for giving the notice to the person objected to, or leaving it at his place of abode."

BRETT, J. I am of opinion that the decision of the Revising Barrister must be affirmed. It is said that the objector has fulfilled all the conditions imposed by sec. 100 to render the stamped duplicate evidence. But the question is, what does the section make it evidence of? The words of the section as to this are, "evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would *in the ordinary course of post* have been delivered at such place. The question therefore is, what is the day (if any) on which, in the ordinary course of post, the notice would have reached the person objected to. There is no evidence that on any known day there would be a delivery at *Wern*, and all that is found is that "unless by some private accidental conveyance, *Evan Evans* would not receive the notice." The facts of the case appear to me to have compelled the Revising Barrister to state the appellant out of court; and I am clearly of opinion that his decision must be affirmed.

DENMAN, J. concurred.

Decision affirmed.

Attorneys.—For Appellant, *Prior, Bigg, Church, & Adams.*

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

UNDER THE STAT. 6 VICT. c. 18.

IN

MICHAELMAS TERM, 1875.

IN THE

THIRTY-NINTH YEAR OF QUEEN VICTORIA.

ASHWORTH, Appellant; HOPPER, Respondent.

1875.
Nov. 16.

AT a Court held by one of the Barristers appointed to revise the list of voters for the north-eastern division of the county of *Lancaster*, *John Hopper*, junior, of &c., duly objected to the name of *William Ashworth*, of &c., being retained upon the list of voters

By deed between the owners in fee of a rentcharge of £120 per annum (described in the deed as trustees) and thirty-four persons (described therein as beneficiaries), after reciting an agreement for the sale by the trustees to each beneficiary of one-fifty-fourth share of the said rent at the price of £52 5s., it was declared that the trustees stood seised of one equal undivided fifty-fourth share of the said rent, and the remedies for enforcing payment thereof, &c., in trust for each beneficiary "his *heirs* and assigns absolutely," and of the remaining shares in trust for themselves in fee. There was a covenant by each beneficiary that if he should desire to sell his share in the said rent and premises, it should first be offered to the trustees at a price to be ascertained, in case of dispute, by arbitration, and a similar covenant by each trustee as to his own beneficial share; and then a declaration that the trustees for the time being should have "an absolute power of sale over the said rent and premises exerciseable at their or his discretion, without any further consent on the part of any person."

Held that under this power the trustees could not sell the share of a beneficiary without being accountable to him for the proceeds of the sale; consequently that each beneficiary took a freehold interest in his share, which would entitle him to the county franchise.

Semble, that the deed was one within the scope of 23 & 24 Vict. c. 145, ss. 1 and 4.

1875.

ASHWORTH v. HOPPER.

for the township of *Newchurch, Deadwen, Clough, Bacup,* and *Wolfenden,* in the north-eastern division of the said county, on the list of claimants for which township the appellant's name appeared.

The appellant claimed to be entitled to vote in respect of one-fifty-fourth share of a freehold rent-charge of £120 under the following deed:—

This indenture, made the 28th day of January, 1875, between *Richard Hoyle Hardman,* of &c., *William Mitchell,* of &c., and *John Munn* the younger, of &c. (hereinafter called "the said trustees"), of the one part; and the several persons (other than the said trustees), whose names are subscribed, and seals affixed to these presents, and whose descriptions are set forth in the schedule hereto (hereinafter called "the said beneficiaries"), of the other part. Whereas by an indenture, dated the 5th day of January, 1875, made between *Richard Siddall* of the one part, and the said trustees of the other part, in consideration of the sum of £2820, therein expressed to have been paid to the said *Richard Siddall* by the said trustees, all those four plots of land, situate, &c., and also all those messuages or dwelling-houses and other buildings erected upon the said plots of land, and the appurtenances, were granted and conveyed to uses limiting thereout unto the said trustees, their heirs and assigns, the clear yearly rent of £120, payable by equal half-yearly payments on the 29th day of January and the 29th day of July in each year, without deduction, the first of such payments to be made on the 29th day of January then instant, together with certain powers and remedies for securing and enforcing payment of the same yearly rent, and subject to the said rent powers and remedies, to the

use of the said *Richard Siddall*, his heirs and assigns, for ever. And in the now reciting indenture are contained divers covenants by the said *Richard Siddall* with the said trustees for payment of the said yearly rent, and as to buildings and other matters as thereby, reference being thereunto had, will fully appear. And whereas the said trustees have agreed with each of the said beneficiaries for the sale to him of the beneficial interest of and in one undivided equal fifty-fourth part or share of and in the said yearly rent, and the securities therefor, at the price of fifty-two pounds five shillings, and upon the terms hereinafter appearing: Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the sum of £52 5s., to the said trustees, paid by each of the said beneficiaries on or before the execution of these presents, one such sum being so paid by each of them, the said beneficiaries (the receipt whereof the said trustees do hereby acknowledge), they, the said trustees, do hereby declare and agree to and with the said beneficiaries respectively, that they, the said trustees, their heirs and assigns, do and shall henceforth stand seised and possessed of one undivided equal fifty-fourth part or share of and in the said yearly rent of £120, and the said powers and remedies for securing and enforcing payment thereof, and the benefit of the covenants, by the said *Richard Siddall*, in the herebefore recited indenture, contained (all hereinafter referred to as "the said rent and premises"), in trust for each of the said beneficiaries, his heirs and assigns, absolutely. And it is hereby further agreed and declared by and between the said trustees, that they, the said trustees, their heirs and assigns, do and shall stand seised and

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possessed of the remaining parts or shares of and in the said rent and premises, in trust for the said trustees, their heirs and assigns, as tenants in common, in equal shares; and each of them, the said beneficiaries, doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said trustees, their heirs and assigns, that if at any time he, the said covenanting party, his heirs or assigns, shall be desirous of selling his or their part, share, or interest of and in the said rent and premises, such part or share shall be first offered to the said trustees, or the survivors or survivor of them, or other the trustees or trustee, for the time being, of these presents, at a price to be ascertained, in case of dispute, by two arbitrators or their umpire, to be appointed and to act in accordance with the provisions of the Common Law Procedure Act, 1854, or any then subsisting statutory modification thereof. And each of them, the said trustees, doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the others of them, their heirs and assigns, that if at any time he, the said covenanting party, his heirs or assigns, shall be desirous of selling his or their beneficial part, share, or interest of and in the said rent and premises (including the benefit of the covenant lastly hereinbefore contained), such part, share, or interest shall first be offered to the others of the said trustees, or the survivor of them, or other the trustees or trustee, for the time being, of these presents (other than the trustee so desiring to sell) at a price to be ascertained in case of dispute in manner aforesaid. And it is hereby expressly agreed and declared that the said trustees, or that the survivors or survivor of them, or that the heirs of such survivor, or that other the

trustees or trustee, for the time being, of these presents, shall respectively have an *absolute power of sale over the said rent and premises, exerciseable at their or his discretion, without any further consent on the part of any person;* and that the power of appointing a new trustee or new trustees, of these presents, shall be exerciseable by the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, administrators or administrator, of the last surviving and continuing trustee, or by the last retiring trustees or trustee; and on every or any such appointment the number of trustees may be either augmented or reduced. And each of them, the said trustees, so far as relates to the acts of himself and his own heirs, executors, and administrators alone, and so as to bind himself, his heirs, executors, and administrators respectively, only while in the actual custody of the deeds and writings hereby covenanted to be produced, and so far as practicable to bind such deeds and writings into whosoever's hands the same may come, and not so as to bind himself, his heirs, executors, or administrators, or to incur any liability in relation thereto further or otherwise, doth hereby for himself, his heirs, executors, and administrators, covenant with each of the said beneficiaries, his heirs and assigns, that they, the said covenanting parties respectively, and their respective heirs and assigns, will at all times, unless prevented by fire or other inevitable accident, upon the request in writing of the covenantee, his heirs, or assigns, or any person lawfully or equitably claiming through him or them any estate or interest in the said rent and premises, at the expense of the person or persons requiring the same, produce to him or them, or to such

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proceeds to reserve to the trustees the power of selling the entire rent-charge exerciseable by the trustees at their own discretion. But so long as the power to sell remains unexecuted, it cannot, it is submitted, affect the nature of the estates which have been created by the same deed under which the power to sell arises, and which vest at once by the operation of the deed. That the estates would vest in such a case, subject to the power of divesting them, seems clearly laid down in the text-books. In *Sugden on Powers*, 8th ed. p. 452, it is said "there is a striking distinction between estates actually limited in a settlement with a power of revocation, and estates limited in default of the exercise of a preceding power of appointment. In the first case the estates are *vested*, subject to be revoked, or defeated, by the exercise of the power." To the question whether in the present case the trustees could exercise the power of sale for their own benefit, and put the proceeds of the sale into their pockets, the answer must be that they clearly could not. In the event of a sale taking place, they must either hold the proceeds for the benefit of the beneficiaries or invest them for their benefit in other hereditaments under the powers contained in sec. 4 of 23 and 24 Vict. c. 145. That the trustees could not, on selling, apply the proceeds for their own benefit, is apparent from the whole scope of the deed. On the face of it, it appears to be a trust deed, entered into between trustees and beneficiaries. Its object, as stated in the deed, is the carrying out of an agreement for the sale to each beneficiary of one fifty-fourth share of a rent-charge, and the consideration for the sale, which it specifies, is one of value. Further, the beneficiaries have the power of selling their interest,

though no doubt controlled by the power of pre-emption in the trustees at arbitration prices. But the circumstance of the beneficiaries having the power to sell at all is clearly inconsistent with a construction of the deed, which would give to the trustees an over-riding power of sale, which they could exercise for their own benefit as and when they might think fit. Whether the power of sale in the trustees be a power to sell the interest of each beneficiary separately, or only to sell the entire rent-charge, may not be absolutely clear on the terms of the deed, but it is submitted that the former is the true construction.

Secondly, even assuming the above proposition, which is denied, viz., that the trustees could, if they sold, apply the proceeds of the sale to their own benefit, that, it is submitted, would not prevent the freehold estates created by the deed from vesting, subject to being divested when the power was executed.

[On this point he referred to *Coke Litt.* 42a; *Wynne* v. *Wynne* (*a*), and *Davis* v. *Waddington* (*b*).]

Edwards, Q.C. for the respondent.

The decision of the Revising Barrister was right. Although the deed is not found to be fraudulent within the 10 Anne c. 23 it is obviously framed, not merely for the purpose of manufacturing votes, which would not *per se* be illegal, but of placing those who under the deed are nominally the beneficiaries in a condition which must render it impossible that the franchise, which is said to be conferred on them, could ever be exercised with freedom or independence. The interest

(*a*) 2 *M. & G.* 19 *n* (a).

(*b*) 1 *Lutw.* 159; *S. C.*, 7 *M & G.* 37, & 45, *n* (a).

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of the beneficiaries under the deed is made absolutely dependent on the will of others, and though no doubt by the language of the deed these other persons are styled trustees, they have really the complete control over those who are in name the beneficiaries. These so-called trustees can at any moment and at their own mere discretion dispose of the interest of any beneficiary absolutely, the transparent object of such a provision being to control the mode in which the vote is to be exercised. The power which is vested in the trustees to sell is, it is submitted, a power not simply to sell the entire rent charge, but at any moment to intervene and sell the share of any one of the beneficiaries. The deed is wholly silent as to the proceeds of the sale. There is nothing in its terms to create a trust of those proceeds for the beneficiaries, and it is submitted that no such trust will arise by implication.

[ARCHIBALD, J. How do you reconcile with that view the power which the beneficiaries seem to have to sell, subject to the right of pre-emption by the trustees at arbitration prices ?]

A person may desire to withdraw when no election is impending. A provision is therefore inserted to enable him to do so, and in such a case to receive from the trustees a price to be fixed by arbitration. But that clause does not conflict with the existence of an overruling power in the trustees, which, if the voter could not be depended on for his support, would inevitably be exercised when an election was impending. The 23 and 24 Vict. c. 145, s. 4, it is submitted, does not apply. The words "such sale" in that section refer to a sale by

trustees under an instrument creating a trust within the 1st section. Here, in the event of a sale by the trustees, there is clearly no express trust created as to the proceeds, and whether or not there be a resulting trust must be gathered as a question of intention from the whole scope of the instrument. The rule on this subject is thus stated as regards devises in *Lewin on Trusts*, 6th ed. p. 129, "no positive rule can be laid down in what cases the devise will carry with it a beneficial character, and in what it would be construed a trust; but on all occasions the Court, refusing to be governed by mere technical phraseology, extracts the probable intention of the settlor from the general scope of the instrument." The rule cannot be limited to wills, but must apply equally to settlements and other deeds such as that now under consideration; and if so the question resolves itself simply into a question of intention. Then can any doubt exist as to what the intention was. Obviously to place the beneficiaries at the mercy of the trustees, and forfeit their interests if they shewed any sign of independence. That being the object of the deed, why should the Court imply a trust which would be at variance with such an intention. It would be clearly at variance with it to imply that, in the event of a sale, there would be a trust of the proceeds for the benefit of the beneficiaries, since that would render the beneficiaries less at the mercy of the trustees. The deed itself is significantly silent as to any such trust, whereas, if such had been the intention of the framers, a few words would have sufficed to express the trust and place its existence beyond question.

Next as regards the authorities. No case in election

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law has ever yet decided that words, *primâ facie*, sufficient to confer a life estate, or a fee simple, will have the effect of conferring the right to vote as a freeholder, when the interest is made determinable at the will of of the grantor. The language of *Rogers on Elections*, 11th ed. p. 14, seems to imply that in the author's opinion they would not. The beneficiaries are here the grantees, the trustees the grantors ; and the interest of the beneficiaries is determinable at the will of the trustees. It must be admitted that in *Co. Litt.* 42a, it is said that "a man may have an estate for terme of life determinable at will ;" which position *Coke* illustrates as follows : "As if the king doth grant an office to one at will, and grant a rent to him for the exercise of his office for the term of his life, this is determinable upon the determination of his office." The above passage from *Coke upon Littleton* is cited by Serjeant *Manning* in his note to *Davis* v. *Waddington* (*a*) as being at variance with the decision arrived at in that case, and from the tenor of the note it would appear that Serjeant *Manning* disapproved of that decision. But *Davis* v. *Waddington* (*b*) has ever since been upheld, as laying down sound electoral law.

[GROVE, J. Do you contend that we can put a different construction on the limitation in the deed according as a vote is claimed in respect of it, or some other right ?]

[ARCHIBALD, J. Besides the citation from *Coke on Littleton*, Serjeant *Manning* quotes the following, per

(*a*) 7 *M.* & *G.* 46. (*b*) 1 *Lutw.* 159 ; *S. C.* 7 *M & G.* 37.

Brian, C. J. (*a*): "A lease expressed to be determinable at the will of the lessor only, cannot however take effect as a conditional lease for life, *unless* the forms prescribed for the passing of a freehold interest be observed, as livery of seisin, &c." Suppose an estate for life conveyed by livery of seisin, would it be less an estate for life, because it was subject to a power of revocation?]

Notwithstanding the learning displayed in Serjeant Manning's note, the case of *Beeson* v. *Burton* (*b*) which followed *Davis* v. *Waddington* (*c*), fully indorsed the doctrine there laid down, that an interest determinable at the will of the grantor is not a freehold interest, which is capable of conferring the franchise. In *Beeson* v. *Burton* (*b*) although the Court sustained the vote, the ground on which they did so was that the interest of the grantees was not in that case determinable at the mere will of the grantors, but that the consent of other parties was essential to its determination. If in that case the power to determine the grantees' interest had been vested in the grantors alone, the Court expressly said that *Davis* v. *Waddington* (*c*) would have applied, and they would have disallowed the vote. *Beeson* v. *Burton* (*b*) resembled the present case in another particular, viz., that the creation of the interest and the power to determine it were there, as here, in independent clauses. The Court will, it is submitted, be disposed to adopt the principle of the modern cases which have been decided on the law of elections, even if they be opposed to some of the *dicta*

(*a*) Notes to *Davis* v. *Waddington*, 7 *M & G.* 47.
(*b*) 2 *Lut.* 225; *S. C.* 12 *C.B.* 647.
(*c*) 1 *Latw.* 159; *S. C.* 7 *M. & G.* 37.

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in Serjeant *Manning's* note. He referred also to *Burgess* v. *Wheate* (*a*), *Ashmore* v. *Lees* (*b*), *Steele* v. *Bosworth* (*c*), and 2 *Jurist*, 459.

Gorst, Q. C. in reply. Reliance has been placed on the circumstance that, in the event of the trustees selling under their power, the deed contains no express trust as to the proceeds of the sale. But the answer to that argument is supplied by the 23 & 24 Vict. c. 145. The reason why the trust is not expressed in the deed, is that those who framed it intended the provisions of the 23 & 24 Vict. c. 145 to apply, and that the trust clauses of the statute should be read into the deed. The express object of the statute was to dispense with the necessity of inserting such clauses at full length in every instrument, as the preamble to the act distinctly states. With regard to *Davis* v. *Waddington* (*d*) and *Beeson* v. *Burton* (*e*) those cases are distinguishable, not only because in this case the beneficiaries would take an interest in the proceeds of the sale, but also because the terms in which the interest is created make the present case entirely different from those cited. Here the freehold is conveyed in the most apt and precise language for conferring an estate of fee simple which the law knows. In the cases cited there was nothing of the kind. The language relied on as creating a life interest was in itself vague and indefinite, and it was held that language of that character would be controlled and interpreted by the reservation of an

(*a*) 1 *Eden*, 177.
(*b*) 1 *Lutw.* 337; *S. C.* 2 *C. B.* 31.
(*c*) *Hopw. & Ph.* 106; *S. C.* 18 *C. B., N. S.*, 22.
(*d*) 1 *Lutw.* 159; *S. C.* 7 *M. & G.* 37.
(*e*) 2 *Lutw.* 225; *S. C.* 12 *C. B.* 647.

arbitrary power in the authority from whom the appointment emanated. One other illustration may be put. Suppose a beneficiary were to die, would it be said that he had no transmissible interest? If it could not, then what is the nature of the interest? Would it not descend to the heir, and be liable to succession duty?

LORD COLERIDGE, C. J.—In this case the Revising Barrister has disallowed the votes, and the question whether he was right in doing so turns on the construction of a deed. The deed is expressed to be made between certain persons called trustees, and others who are styled beneficiaries, and it recites a conveyance under which in consideration of the sum of £2,820 paid by the trustees certain land was conveyed to uses limiting thereout to the trustees a yearly rent of £120. This rent the trustees by the deed now under consideration proceed to deal with, and they dispose of it to the extent of thirty-four shares of one-fifty-fourth each among the beneficiaries (allotting one share to each beneficiary) at the price of £52 5*s.* per share, the remaining twenty shares being retained by the trustees. It is material to examine the language of the deed. It recites that the trustees have agreed to sell to each of the beneficiaries one-fifty-fourth part of the said rent, at the price of £52 5*s.*, and in the operative part that in pursuance of the agreement and in consideration of the sum of £52 5*s.* paid to the trustees by each of the beneficiaries (the receipt whereof the trustees thereby acknowledge) they the said trustees declare and agree that they, their heirs and assigns shall stand seised and possessed of one undivided fifty-fourth part of the said yearly rent of £120, and the "powers

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and remedies for securing and enforcing payment thereof and the benefit of the covenants" in the recited indenture in trust *for each of the said beneficiaries, his heirs and assigns absolutely.* So far no one could doubt that the words would create an equitable fee in each beneficiary. The question is whether in the subsequent part of the deed there is anything to cut down the fee so *primâ facie* created, and to prevent the interest being of a freehold character. The deed proceeds to declare that the trustees are to stand seised and possessed of the remaining parts of and in the said rent and premises in trust for themselves, their heirs and assigns as tenants in common in equal shares—so that the beneficial interest in these remaining shares continues in the trustees. Then each of the beneficiaries covenants with the trustees that if he shall be desirous of selling his "part, share, or interest of and in the said rent and premises," it shall first be offered to the trustees at a price to be ascertained by arbitration. That clause does not in any way conflict with the absolute vesting of a freehold interest in each beneficiary. Then each of the trustees enters into a similar covenant with his co-trustees for the offer to them of his share at prices to be fixed by arbitration, if he should desire to sell it. Then follows this important clause:—"And it is hereby expressly agreed and declared that the said trustees, or that the survivors or survivor of them, or that the heirs of such survivor, or that other the trustees or trustee for the time being of these presents shall, respectively have an absolute power of sale over the said rent and premises exerciseable at their or his discretion without any further consent on the part of any person." Now, speaking for myself, I

think that that power of sale extends to a sale of each fifty-fourth share, as well as to a sale of the entire *corpus*; but whether it does so or not is not material to the conclusion at which we have arrived. If the trustees had not the power of selling each fifty-fourth share separately, they had at all events the power to sell the whole *corpus* without the consent of any beneficiary; and if that power could be regarded as one which the trustees could exercise for their own benefit, and if they were entitled to put the money derived from such sale into their own pockets, I, as at present advised, should be of opinion that the cases of *Davis* v. *Waddington* (*a*) and *Beeson* v. *Burton* (*b*) applied, and that such a power operated to prevent the deed from conferring a freehold estate. But here I do not think that the true construction. Here each beneficiary has paid a valuable consideration for his interest, and if the trustees under the power of sale which is vested in them were to sell, they clearly could not be allowed for their own benefit to sell the interest of the beneficiaries, and to put the proceeds of the sale into their own pockets. Although the power of sale is in terms absolute, and no trust of the proceeds is created by express words, this at all events is to be collected from the deed, that the trustees cannot by exercising that power forfeit the interest of the beneficiaries. If under that power a sale takes place, the proceeds must either be invested in other hereditaments, upon the same trusts, or else their proportion of the money must be paid over to the beneficiaries. And that to my mind shows that until a sale does take place there is a freehold interest in

(*a*) 1 *Lutw.* 159; *S. C.* 7 *M. & G.* 37.

(*b*) 2 *Lutw.* 225; *S. C.* 12 *C. B.* 647.

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each beneficiary. It may be, as has been suggested in argument, that a fraud on election law was here intended—though the Revising Barrister has not found that it was. It may be that the object of those who framed this deed was, not merely to create votes, which they may do where the conveyance is *bonâ fide*, but to retain an absolute power over the voter by enabling the trustees at any moment to forfeit his interest. If indeed that were the object of the deed, I am of opinion that here it has not been attained, since if the trustees sell, they must at all events account to the beneficiaries for the proceeds of the sale. I am of opinion that the decision of the Revising Barrister must be reversed.

GROVE, J. I am of the same opinion. Upon the question whether a conveyance to a man and his heirs, subject to a power of revocation at the will of the grantor, is the conveyance of a freehold interest, it is unnecessary to express an opinion. I am certainly not satisfied that it is not, and the passage from *Co. Litt.* 42a, which is also cited in *Comyn's Digest* (*a*), as well as the authorities collected by Serjeant *Manning* in his note to *Davis* v. *Waldington* (*b*), seem to show that where the language is such as to confer freehold estate, it is freehold notwithstanding it be defeasible at the will of the grantor. That, however, it is unnecessary to decide. So also it is unnecessary to decide whether the power of sale extends to a sale of each fifty-fourth share, as well as to a sale of the entire rentcharge.

(*a*) *Comyn's Digest* (Tit.) Estates, E. 1: "So if the king grants office at will and a rent for it for his life; he has an estate for life in the rent, though it determines with the office."

(*b*) 7 *M. & G.* 45.

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The point on which I base my opinion here is that this power of sale cannot be construed as a power existing for the mere benefit of the trustees, but as a power for the benefit of the beneficiaries. We must look exclusively to the language of the deed, since there are no extraneous facts found which can guide our decision. The question, therefore, is whether when these thirty-four persons have each paid a sum of £52 5s. for a thing which by the terms of the deed is to be held in trust for each of them and his heirs absolutely, they have paid those sums in order to purchase what is really in substance nothing, while those who have sold to them and received the money can immediately afterwards sell again, and put the proceeds of the sale into their own pockets. I own that such a construction of the deed appears to me unreasonable. In the deed the sellers are named trustees —a word which on the suggested construction would be idle—and the other parties who have paid substantial value for what they purchase, beneficiaries; and in construing the deed I entertain no doubt that a Court of Equity would hold, in the event of the power being exercised, that there was a resulting trust of the proceeds for the benefit of the beneficiaries. If necessary, I also think that would be supplied by the 23 & 24 Vict., c. 145, but I do not think it is required. The deed is apparently within sec. 1, as a deed which names trustees and declares that they shall have a power of sale over "the hereditaments named or referred to in such deed," and, if so, the provisions of sec. 4 apply to a sale by the trustees under the power contained in the deed. Upon these grounds I am of opinion that each of these beneficiaries did take a

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freehold interest in the rentcharge, and that consequently the decision of the Revising Barrister against their right to vote must be reversed.

ARCHIBALD, J. I am of the same opinion. The sole question here is whether the appellant takes a freehold interest. That turns on the construction of a deed which we must construe without any regard to the motives of the grantor, just as if it were a deed for carrying out some family arrangement, or for any other purpose. Now the language of the earlier part of this deed is undoubtedly such as to create a freehold interest, and in apt terms. Whether if the power of sale could be construed as Mr. *Edwards* contends, it would then operate to cut down the words by which a freehold is created, and by this means the case of *Davis* v. *Waddington* (*a*) be made to govern the present, is a matter on which I guard myself from expressing an opinion. I am clearly of opinion that the power of sale cannot be so construed. The appellant has paid value for his interest, the deed contains ample words to show that it is freehold, and express provision is made for the appellant's disposing of it. He is to do so at a price to be fixed by arbitration if the trustees desire to purchase it. I think that under these circumstances it would be a strong thing to hold that the general power of sale contained in the deed is one that can be exercised by the trustees for their own benefit to the exclusion of the beneficiaries. I think that that power, if exercised at all, must be exercised for the benefit of the beneficiaries, and, if so,

(*a*) 1 *Lutw.* 159; *S. C.* 7 *M. & G.* 37.

it cannot avail to cut down the freehold interest which the earlier part of the deed creates.

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If any doubt could exist on equitable principles, I think the 23 & 24 Vict., c. 145 applicable, and that we must read the statute as if the clauses which it supplies were embodied in the deed.

Decision reversed.

Solicitors—For Appellant, *Ridsdale, Craddock, and Ridsdale, for Robinson & Sons, Blackburn.*

For Respondent, *Robinson & Preston, for J. and W. Eastham, Clitheroe.*

HARGREAVES, Appellant; HOPPER, Respondent.

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One who is under age on the 31st of July is not entitled to be registered at the succeeding Revision, though then of full age, in respect of the county occupation franchise, conferred by sec. 6 of the Representation of the People Act, 1867.

AT a Court held by one of the Barristers appointed to revise the lists of voters for the North Eastern Division of the County of Lancaster, *John Hopper*, junior, of &c., duly objected to the name of *Joseph Hargreaves*.

The name of the said *Joseph Hargreaves* was inserted by the overseer in the list of persons entitled to vote in the election of a knight or knights of the shire for the said division in respect of his occupation as tenant of a house and shop at *New-hall-hey Bridge* within the said township of the rateable value of £12 or upwards.

It appeared by the evidence that the said *Joseph Hargreaves* had occupied the said shop for two years or thereabouts, but that he only attained the age of twenty-one after the expiration of the qualifying year namely on the 16th of September, 1875.

It was contended on behalf of the said *John Hopper* that the said *Joseph Hargreaves* was not entitled to have his name retained in the said list under the 6th section of the Representation of the People Act, 1867, because he had not as a person of full age occupied the said premises during the whole or any part of the qualifying year.

The Revising Barrister concurred in this view and

struck off the name of the said *Joseph Hargreaves* from the said list.

If the Court should be of opinion that the decision of the Revising Barrister was wrong the Register was to be amended by restoring the name of the said *Joseph Hargreaves* on the said list.

Gorst, Q.C., for the appellant. The appellant was of full age at the time of the revision, though not on the 31st of July and the question is whether the Revising Barrister was right in holding that under these circumstances he was not entitled to be registered. It is submitted that the Revising Barrister was wrong. The sections on which the question turns are sec. 40 of 6 Vict., c. 18, and sec. 6 of the Representation of the People Act, 1867, and it will be seen on referring to these sections that although, in order to entitle a man to be registered, his title must, as regards the subject matter which qualifies, be complete on the 31st of July, it is sufficient as regards his personal capacity if it be complete at the time of the revision. Section 6 of the Representation of the People Act, 1867, says "Every man *shall* . . . . be entitled to be *registered as a voter*, and when registered to vote . . . . who is qualified as follows; (that is to say) 1. *Is* of full age, and not subject to any legal incapacity." The period there referred to is clearly the period of the revision. There is nothing in the context to justify the straining of language which would be involved in construing the word "is" to mean "was on the 31st of July preceding." As regards the construction of sec. 40 of the 6 Vict., c. 18, though there is no actual decision on the point, there is the express opinion of

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Erle, C. J., in *Powell* v. *Bradley* (*a*), in favour of the construction contended for. Section 40 enacts that in cases of objection the Revising Barrister shall require it to be proved that the person objected to "was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list; and in case the same shall not be proved to the satisfaction of such Barrister, or in case it be proved that such person was then incapacitated by any law or statute from voting in the election of members to serve in Parliament, such Barrister shall expunge the name of every such person from the said lists." In *Powell* v. *Bradley* (*a*), *Erle*, C. J., was of opinion that the decision of the Revising Barrister having been substituted for what formerly took place at the polling booth, the time with reference to which, under sec. 40, the capacity of the voter must be ascertained was when he presented himself before the Revising Barrister in support of his claim, as formerly the question would have arisen when he presented himself at the polling booth. And in *Haward* v. *Lord Rendlesham* (*b*), the opinion thus expressed by *Erle*, C. J., as to the construction of sec. 40 was referred to by Lord *Coleridge*, C. J., without disapproval, though no doubt the point was not material to the decision of the case which was then before the Court. The point cannot be confined to the question of infancy, but must apply equally to every kind of incapacity, and the effect, if the contention for the respondent prevail, would be in the case of a peer created after the 31st of July, that the

(*a*) *Hopw. & Ph.* 162, 163; *S. C.* 18 *C. B., N. S.*, 69, 70.

(*b*) *Ante*, p. 184; *S. C. L. R.* 9 *C. P.* 256.

Revising Barrister could not decline to register him as a voter, even though he were duly objected to.

No one appeared on behalf of the respondent.

Lord COLERIDGE, C. J. I am of opinion that the decision of the Revising Barrister should be affirmed. The objection to the vote is that the appellant was not entitled to be on the register, because, though of full age at the date of the revision, he was not of full age on the 31st of July next preceding. In every other respect it must be taken that he was duly qualified.

The section which regulates the proceedings in the Court of Revision is sec. 40 of the 6 Vict. c. 18, which enacts that, in cases of objection—and the present is such a case—after the notices of objection are proved, the Revising Barrister "shall then require it to be proved that the person so objected to was entitled *on the last day of July* then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list; and in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was *then* incapacitated by any law or statute from voting, such barrister shall expunge the name of every such person from the said lists." Now on the 31st of July the appellant was not entitled to be on the list of voters, for he was then subject to disqualification as not being of full age. We have been pressed, however, with the language of the sixth section of the Representation of the People Act, 1867, which enacts that "Every man *shall* . . . . be entitled to be *registered as a voter*, and when registered to vote . . . . who is qualified as follows; (that is to say)—1. "*Is* of full age

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and not subject to any legal incapacity." And reliance is placed on the use of the word "is." But in sub-section 2, which immediately follows, the words employed are "*Is on the last day of July* in any year . . . . the occupier, &c." language which shews that in sub-section 2, at all events, "is" must be read "was," because the Revision cannot take place till after the 31st of July, and it would seem reasonable that the word "is" should receive the same construction in both sub-sections. If any doubt, however, could exist, it is put an end to by sec. 59, by which, as far as is consistent with its tenor, the Act of 1867 is to be construed as one with the Registration Acts. So construing it I read sec. 6 as follows, "Every man . . . . shall be entitled to be registered" who is *according to the Registration Acts* of full age, which one who is not of full age on the 31st of July preceding the revision is not. We have been further pressed with the case of *Powell* v. *Bradley* (*a*), a decision of this Court, and no doubt if what was there decided had been in point, I should have required some very strong argument to induce me to depart from its authority. But the decision in *Powell* v. *Bradley* (*a*) was perfectly correct. In that case the claimant had attained the age of 21 in March of the qualifying year; consequently he was of full age on the 31st of July; it was contended that to entitle him to be registered he should have been of full age for the whole 12 months preceding the 31st of July, a requirement which the Court rightly held was not contained in the Act of Parliament. It is true that the judgment of *Erle*, C. J. contains some expressions which seem to point to the revision as the time in reference to which the Revising Barrister has

(*a*) *Hopw. & Ph.* 162, 163; *S. C.* 18 *C. B., N. S.*, 69, 70.

to ascertain whether the voter is of full age ; but those expressions were quite unnecessary to the decision. I do not observe that any of the other judges concurred in them ; nor can I myself agree with that part of the judgment. Some language of my own in *Lord Rendlesham* v. *Haward* (*a*) (the first case in which I pronounced judgment in this Court) has been also quoted, in which I appear to have referred to that part of the Chief Justice's judgment in *Powell* v. *Bradley* (*b*), as having laid down the law as I have stated. I fear that in that case I followed the example of *Erle*, C. J., in saying more than was necessary for the decision of the case. If, however, I am supposed to have expressed any opinion there which is at variance with our present decision, I do not hesitate to say that such an expression of opinion was wrong.

GROVE, J. In this case I own I entertain considerable doubt, arising from the reluctance which I feel at departing from the words of an Act of Parliament ; and if it had been possible to have fulfilled both the enactments which have been referred to without any alteration in the language I should have felt bound to differ. My Lord has however pointed out that in sec. 6 of the Representation of the People Act, 1867, the word "is" must, where it occurs in sub-section 2, be necessarily read in the past tense, since the revision cannot be held till after the 31st of July ; and, having regard to the fact that the Act of 1867 is to be construed as one with the Registration Acts, I am not prepared to dissent from the opinion at which the Court have arrived.

(*a*) *Ante*, p. 184 ; *S. C. L. R.* 9 *C. P.* 256.

(*b*) *Hopw. & Ph.* 162, 163 ; *S. C.* 18 *C. B. N. S.* 69, 70.

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ARCHIBALD, J. I entirely concur in the opinion which my Lord has expressed. By the 59th section we are to read the Act of 1867, so far as is consistent with its tenor, as one with the Registration Acts. So reading it, I come to the conclusion that sec. 40 of the Registration Act, and sec. 6 of the Representation of the People Act, 1867, both refer to the 31st of July as the time at which the voter must be of full age, as it is also the time at which he must be proved to be otherwise entitled in respect of the described qualification. I think that when read together there is no conflict between the two enactments.

Decision affirmed.

Solicitors—For Appellant, *Ridsdale, Craddock, & Ridsdale, for Robinson & Sons, Blackburn.*

Wood, Appellant; Hopper, Respondent.

1875.
Nov. 16.

The owner of freehold rentcharges, each below, but together exceeding 40*s.* in annual value, is entitled to the county franchise as owner of "free tenement" of the required value within 8 Hen. 6, c. 7, although the rentcharges issue out of distinct estates.

AT a Court held by one of the Barristers appointed to revise the lists of voters for the north-eastern division of the County of *Lancaster*, *John Hopper*, junior, of &c., duly objected to the name of *William Wood* being retained on the register of voters for the township of *Blackburn*, in the said division, in respect of freehold rentcharges. The title deeds of the said *William Wood* were produced, from which it appeared—

1. That by an indenture, dated December 11th, 1857, made between *William Ainsworth* of the first part, *John Kenyon* of the second part, and *Edward Clark* of the third part, a plot of land in *Alma Street*, *Blackburn*, was conveyed to uses for securing the payment for ever thereout of the yearly rentcharge of £1 5*s.*, and subject thereto, to the use of the said *John Kenyon*, his heirs and assigns, for ever.

2. That by another indenture, dated the 12th January, 1859, made between the said *William Ainsworth* of the one part, and *Thomas Dewhurst* of the other part, another plot of land adjoining the before mentioned piece, was conveyed to uses for securing the payment for ever thereout of the yearly rentcharge of £1 3*s.* 7*d.*, and subject thereto, to the use of the said *Thomas Dewhurst*, his heirs and assigns, for ever.

3. That by an indenture, dated 20th October, 1869,

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made between *James Stott* and *Leonard Wilkinson* of the first part, *Nancy Ainsworth* of the second part, *Robert Collinson Mellor* of the third part, and *William Wood* of the fourth part, the said yearly rentcharges were conveyed unto and to the use of the said *William Wood*, his heirs and assigns, for ever.

It was contended, on the part of the objector, that the said *William Wood* was not entitled to have his name retained on the said list of voters, inasmuch as neither of the said rentcharges was of the value of 40s. a-year, whilst the language of the statute 8 Henry 6, c. 7, as to who shall be choosers, says, "whereof every one of them shall have free land or tenement of the value of 40s. by the year;" from which it was argued, that a rentcharge being a tenement, and the word tenement being used in the statute in the singular number, it is impossible to add two rentcharges or two tenements together to make up the requisite value.

That a rentcharge was so called because of the power of distress contained in the deed creating the same; and in each of the above cases the power of distress was confined to the particular plot from which the rentcharges issued respectively.

The Revising Barrister concurred in this view, and expunged the name of the said *William Wood* from the said list.

The same point of law was also raised in the case of another person, whose name was given in the schedule, and the Revising Barrister ordered the two appeals to be consolidated.

If the Court should be of opinion that the decision of the Revising Barrister was wrong, the register was to

be amended by restoring the names of the said *William Wood* and of the said other person.

Gorst, Q.C., for the appellant: The Revising Barrister appears to have thought, that the word "tenement" being used in the 8 Hen. 6, c. 7, and a rentcharge being a "tenement," two rentcharges could not be joined to make up the qualification. But it is submitted that his construction of the statute was clearly wrong. The statute does not give the franchise to those who have "*a* tenement," but "free land or tenement," of the required value. Two pieces of land in the same county could clearly be joined to make up the value of the qualification, and why not two rentcharges? The words, which appear in the translation of the statute as follows, "whereof every one of them shall have free land or tenement to the value of forty shillings by the year at the least, above all charges," are thus rendered in the original Norman-French "dount chescun ait frank tenement a le valu de xl *s.* par an al meins outre les reprises," so that there is clearly no distinction between joining two pieces of land, and joining two rentcharges. *Gadsby* v. *Barrow* (*a*) if, it should be relied on, is manifestly not in point. There the question was whether an occupier of two pieces of land under different landlords at two rents, each below, but together exceeding £50, was *bonâ fide* liable to *a* yearly rent of not less than £50; and the Court rightly held he was not. But *Maule* J., expressly distinguished such a case as the present, and pointed out that where *value*, and not liability to pay a certain rent is the criterion, there is a strong presumption that a right is intended to be

(*a*) 1 *Lutw.* 142; *S. C.* 7 *M. & G.* 21.

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conferred, whether the value be made up of one or many items.

Edwards, Q.C. for the respondent, admitted that, if, as the Court appeared to think, the word "tenement" in the 8 Hen. 6, c. 7 could not be limited to a single tenement, he could not support the decision of the Revising Barrister.

Lord COLERIDGE, C. J. I am of opinion that the decision of the Revising Barrister was wrong, and should be reversed. The objection which prevailed before the Revising Barrister was, that the appellant, although possessed of two freehold rentcharges within the county which together exceeded in annual value 40s., had not that amount annually from either rentcharge, nor the power of raising it by a single distress. The case of *Gadsby* v. *Barrow* (*a*) has been relied on in support of the objection, but of that case it is enough to say that it depends upon its own facts and circumstances, and that it is not in point. My opinion proceeds entirely on the language of the 8 Hen. 6, c. 7, an enactment passed to reduce the number of electors in the counties. It enacts that the electors are to have frank tenement "to the value of 40*s.* by the year at least, above all charges;" and then adds by way of explanation that "such as have the greatest number of them that may *expend* 40*s.* by year, and above, as afore is said" shall be returned. That language seems to me to show that what the statute meant the electors to have, in order to entitle them to the franchise, was freehold property within the county to the value of 40*s.*; and as the appellant has

(*a*) 1 *Lutw.* 142; *S. C.* 7 *M. & G.* 21.

that, I am of opinion that he is entitled to be on the register.

GROVE, J. I am of the same opinion. The object of the enactment as shewn by the preamble, was to prevent persons of small substance and no value from taking part as voters in the elections, and with that view it enacted that electors were to have frank tenement to the value of 40s. by the year (a substantial sum in those days), and that he who could not expend 40s. by the year was to have no vote. The object of the enactment therefore was, not to limit the franchise to a single tenement, but that tenements, which were to confer the franchise on a voter, should give him a clear 40s. by the year in value.

ARCHIBALD, J., concurred.

Decision reversed.

Solicitors—for Appellant, *Ridsdale, Craddock, & Ridsdale, for Robinson & Sons, Blackburn.*

For Respondent, *Robinson & Preston, for J. & W. Eastham, Clitheroe.*

A

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

UNDER THE STAT. 6 VICT. c. 18,

IN

MICHAELMAS TERM, 1876.

IN THE

FORTIETH YEAR OF QUEEN VICTORIA.

DAWSON, Appellant; ROBINS, Respondent.

1876.
Nov. 17.

The grantee of a freehold rentcharge sufficient in value to confer the county franchise, is not deprived of such franchise by the circumstance that the land is at the time of the grant under lease for a long term (so as to suspend the grantee's power of distress) the ground rent reserved by the lease being sufficient to pay the rentcharge.

AT a Court held at *Southampton* by the Barrister appointed to revise the lists of voters for the southern division of the county of *Hants*, objection was duly made to the claim of *Oliver Robert Dawson* to have his name inserted in the list of voters in the parish of *St. Mary* for the said southern division of the said county.

The qualification stated by the said *Oliver Robert Dawson* in his claim was a freehold rentcharge issuing out of houses and land, *Itchen Bridge Road*, and *Dock Street*; *Henry Compton*, owner.

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It appeared that by an indenture, bearing date 29th of September, 1874, the reversion in fee in the said premises was conveyed to the said *Henry Compton*, subject to certain leases of 1000 years, each created by indenture of demise, bearing date the 29th of July, 1864. In each of these leases a ground rent was reserved, and in each was contained a power of re-entry on default. These leases are still subsisting.

By indenture bearing date the 15th of January, 1875, the said *Henry Compton* granted to the said *Oliver Robert Dawson* (in fee) a yearly freehold rentcharge of £2 10*s*., charged upon the said premises. The said indenture also contained a power of distress on default of payment of the said rentcharge.

Copies of the aforesaid indenture of the 29th of September, 1874, and of the 15th of January, 1875, were annexed to the case.

It was not disputed that the reserved ground rent was amply sufficient to meet this and other rentcharges granted about the same time, and issuing out of the same premises, and that the amount due to the said *Oliver Robert Dawson* and the other grantees had been actually paid to each of them respectively by the agent of the said *Henry Compton*.

The Revising Barrister was of opinion that, considering the nature of *Henry Compton's* interest, the power of distress contained in the indenture of the 15th of January, 1875, was nugatory, and disallowed the claim of the said *Oliver Robert Dawson*.

The cases of four other persons, whose claims were objected to on the same grounds, were consolidated with this case.

If the Court should be of opinion that the decision of

the Revising Barrister was wrong, the register was to be amended by inserting the names of *Oliver Robert Dawson* and the four other persons.

Ridley, for the appellant. The decision of the Revising Barrister was wrong. The appellant has clearly "franktenement" within the 8 Hen. 6, c. 7. He is the owner in fee of a rentcharge, charged upon freehold property, and of sufficient value to confer the franchise. The Revising Barrister appears to have thought that, because the power of distress in the deed creating the rentcharge cannot be exercised before the determination of certain terms of years, which were already in existence when the rentcharge was created, it followed that the rentcharge could not qualify. But that, it is submitted, is not the true test of qualification. It is enough that the language of 8 Hen. 6, c. 7, is satisfied; and it is satisfied by the existence of franktenement of the required value. In *Dodds* v. *Thompson* (*a*) it was held that a rentcharge created by a deed which contained no power of distress was "franktenement" within 8 Hen. 6, c. 7; and *Byles*, J., expressly said that it would not be the less a freehold tenement because there was no power of distress in the deed. The appellant is not without remedies for enforcing payment of his rentcharge. *Thomas* v. *Sylvester* (*b*) establishes that, since the abolition of real actions by 3 & 4 Will. 4, c. 27, s. 36, the arrears of a rentcharge can be recovered in an action of debt founded on privity of estate. And *Whitaker* v. *Forbes* (*c*), which establishes that in order that debt

(*a*) *Hopw. & Ph.* 285; *S. C.* *L. R.* 1, *C. P.* 133.
(*b*) *L. R.* 8 *Q. B.* 368.
(*c*) *L. R.* 10 *C. P.* 583; affirmed in error, *L. R.* 1 *C. P. D.* 51.

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may lie by reason of the privity of estate, the land charged with the rent must be in this country, confirms the doctrine of *Thomas* v. *Sylvester* (*a*).

The Court then called upon—

Chester, for the respondent. The decision of the Revising Barrister was correct. The rent which has been granted to the appellant is not charged upon land in the sense that the appellant can resort to the land for payment of it. It is charged upon a reversion in fee expectant on the determination of certain leases for years. The terms created by the leases are each for a period of 1000 years, and so long as these terms are in existence, the grantee of the rentcharge cannot have recourse to the land. His remedy, if the rent be in arrear, is simply personal by an action of debt against the reversioner.

[LINDLEY, J. What say you to the remedy in Chancery? In *White* v. *James* (*b*) the Court decreed a sale of land to satisfy arrears of a rentcharge.]

The land is not charged here, but only the reversion. The appellant might have a right to impound what comes to the hands of the reversioner, but he can have no right to come upon the land to satisfy the arrears of his rentcharge.

[LINDLEY, J. Could he not get a receiver appointed? The receiver would be able to come upon the land.]

A receiver, if appointed, would be merely in substitu-

(*a*) *L. R.* 8 *Q. B.* 368. (*b*) 26 *Beav.* 191.

tion of the reversioner. He would not represent the grantee of the rentcharge. The grantee's right would be merely to receive a money payment out of a fund, whether received by the reversioner or the receiver. Although that fund would be the ground rents, a payment thereout would not be rent, for rent cannot issue out of a rent. In *Bac. Abr.* tit. *Rents* B it is said, "no rent can issue out of any incorporeal inheritance which lies in grant, because they are such things in their nature as a man can never recur to for a distress . . . So rent cannot issue out of a rent, for the statute of *Westm.* 2 (13 *Ed.* 1, *stat.* 1, gives an assize in *certo loco capiendo*; but a rent cannot be put in view" (*a*). *Steele* v. *Bosworth* (*b*) illustrates the distinction which exists with regard to the franchise, between one who has the right to come upon the land, and one whose right is merely to receive a certain money payment out of the profits, but no right to have recourse to the land itself. *Dodds* v. *Thompson* (*c*) is plainly distinguishable, for in that case the power of distress given by 4 Geo. 2, c. 28, s. 5, was presently exerciseable. *Thomas*

(*a*) The proposition cited in the text, from *Bacon's Abridgement*, that rent cannot issue out of an incorporeal inheritance is, however, immediately afterwards qualified in the following passage of the same work, cited from *Gilbert on Rents*: "But though a remainder or reversion be incorporeal, and can pass only by grant, yet a rent reserved upon a grant of them is good; for though the grantor has no remedy for them during the continuance of the particular estate, yet since they relate to lands which were originally granted to make profit of, the judges have gone as far as they could to pursue the intentions of such original donations, and therefore have admitted such reservations to be good immediately, since the lands in which the grantor had the reversion were originally given for that purpose, viz., to make profit of. And this construction is the more reasonable because in this case there is a remedy by distress for all the arrears, when the reversion executes by determination of the particular estate, whereas there is no possibility of such remedy in the case of tithes, commons, fairs, &c."

(*b*) *Hopw. & Ph.* 106; *S. C.* 18 *C. B. N. S.* 22.

(*c*) *Hopw. & Ph.* 285; *S. C. L. R.* 1, *C. P.* 133.

1876.

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v. *Sylvester* (*a*), and *Whitaker* v. *Forbes* (*b*), only establish a proposition, which it is unnecessary to controvert, viz., that the appellant has a personal remedy against the reversioner, in this case the grantor of the rentcharge, by action of debt.

Ridley was not heard in reply.

LORD COLERIDGE, C.J. I am of opinion that the decision of the Revising Barrister must be reversed. An ingenious argument has been pressed upon us on certain questions which in my judgment do not arise. We have simply to see whether the appellant has that qualification which the 8 Hen. 6, c. 7, requires, viz., "franktenement to the value of 40*s.* by the year." Now the position is simply this: *Compton*, the grantor of the rentcharge, being the owner in fee of land, subject to certain leases on which it had been let, at reserved ground rents, grants certain rentcharges issuing out of the land (the ground rents being admittedly sufficient to bear the rentcharges), and one of these rentcharges of the annual value of £2 10*s.*—sufficient therefore within the 8 Hen. 6, c. 7—he by a good assurance grants to the appellant, and the appellant has ever since been in actual perception of the rent.

I think that under these circumstances it is enough to say that the requirements of the statute are complied with, and that the appellant is entitled to be on the register.

LINDLEY, J. I am of the same opinion. The question resolves itself into two; first, what the appellant's

(*a*) *L. R.* 8 *Q. B.* 368.
(*b*) *L. R.* 10 *C. P.* 583; affirmed in error, *L. R.* 1 *C. P. D.* 51.

interest is? and secondly, what is its value? Now the interest is clearly freehold; for it is a rentcharge granted to the appellant and his heirs, and charged upon a reversion in fee, expectant upon the determination of certain subsisting terms. Then, as regards the value, the case expressly finds that the reserved ground rents are amply sufficient to meet this and the other rentcharges, and that the appellant is in actual receipt of the rent. There is therefore a rent, which has a market value, and further, there are remedies for enforcing payment of it, and to my mind there are plainly remedies against the land; by sale, if necessary, of an *aliquot* part of the reversion. Seeing then that the right exists, and that there are the remedies which have been pointed out for enforcing it, I think it no sufficient objection to the vote that the remedy by distress is not available.

Decision reversed.

Solicitors—For Appellant, *Roberts & Barlow*, for *Coxwell, Bassett, & Stanton, Southampton.*

For Respondent, *Bradby, Robins, & Son, Southampton.*

HARRISON, Appellant; CARTER, Respondent.

COOK'S CASE.
PORT'S CASE.

COOK'S CASE.

1876.
Nov. 17.

Alms which under s. 36 of the Reform Act disentitle the recipient to be registered for the borough franchise are not confined to those which come out of funds administered by the parochial authorities.

The surplus rents of certain lands, which by will were distributable among the poorest inhabitants of a tything at the discretion of trustees, averaged £40, which the trustees yearly distributed as they thought fit among about eighty inhabitants of the tything, in sums varying from 2*s.* 6*d.* to 12*s.* 6*d.*, according to the necessities of the recipient, and the number of his family. A proper recipient of this charity had within the qualifying year received 12*s.* 6*d.* from the trustees. Held that this was a receipt of "alms," which under s. 36 disentitled him to be registered.

AT a Court for the revision of the Parliamentary list of voters for the borough of *Petersfield*, *John Cook*, of *Weston*, in the parish of *Buriton*, in the said borough, who was on the list of voters as an inhabitant householder in the said parish of *Buriton*, was duly objected to as not being qualified, inasmuch as it was alleged that he had within twelve months next previous to the last day of July in the present year received alms, which by the law of Parliament disqualified him from voting in the election of a member to serve in Parliament. The facts upon which this objection was founded were the following:

In the year 1664, one *John Goodyer* by his will left certain funds for charitable purposes.

The only portion of such will necessary for the consideration of this case is as follows:

"I give and devise unto my honoured friend, *Leonard Bilson*, Esquire, and my nephew *Edmund Yalden*, in the county of *Surrey*, clerk, and to his heirs and assigns for ever, all my messuage dwelling-house, together with all the barns, stables, outhouses, and buildings, and all the gardens and orchard thereunto belonging, situate in *Weston* aforesaid, called *Halfpenny Land*, now in the

possession of *Thomas Jacques*, together with the free liberty to water and overflow the said lands, as it is now and heretofore hath been used for the best improvement thereof, to the intent and purpose that they the said *Leonard Bilson* and *Edmund Yalden*, and the survivor of them, their heirs and assigns, shall grant and convey all the said messuage, land, and premises, with the appurtenances, unto six able, honest, and sufficient persons, their heirs and assigns, as they or the survivor of them shall think fit, upon trust and confidence, and to the intent and purpose, that all the yearly rents, issues, and profits of the said messuage land and premises shall be employed and disposed of for ever hereafter for the putting forth and placing abroad of all such poor children of the tything of *Weston* aforesaid; and the overplus thereof shall be distributed unto the poorest inhabitants of the said tything of *Weston* aforesaid as my said trustees and their assigns shall think fit."

The overplus, after making payments for education, apprenticeship fees, and sundry expenses, generally amounts to about £40, which sum is distributed once in each year (generally in the spring) by the trustees amongst about eighty of the labouring population of the tything of *Weston*, in the said parish of *Buriton*, according to their discretion, in sums varying from 2*s.* 6*d.* to 12*s.* 6*d.*, according to the necessities of the recipient and the number of his family.

Personal application is not made to the trustees, who make inquiry by themselves or their agent into the circumstances of the inhabitants of the tything of *Weston*, and they decide who are fitting persons to

1876.

HARRISON v. CARTER. COOK'S CASE.

receive, and who shall receive a grant from the charity, and of what amount that grant shall be.

The money was distributed on the 10th of January in the present year, and the said *John Cook* then received 12*s.* 6*d.*, the largest sum granted.

The said *John Cook*, who is an agricultural labourer, is a married man, with five children, and has from time to time applied for and received parochial relief. He was omitted from the list of voters for the year 1874–1875, on the ground of the receipt of parochial relief, but he received no such relief in the electoral year which expired on the 31st of July last.

Previously to the passing of the Reform Act of 1867, the said *John Cook* was not entitled to exercise the Parliamentary franchise, the house which he then occupied and now occupies being of insufficient value to confer a qualification under the Reform Act of 1832, and he being not otherwise qualified.

The said *John Cook* was a proper recipient of the charity.

The Court were to be at liberty to draw inferences of fact.

Upon objection taken that this was a receipt of alms, which incapacitated the said *John Cook*, the Revising Barrister decided that it was not such receipt, and retained the name of the said *John Cook* on the list.

The question for the consideration of the Court was, whether or not he did right in so retaining the name of the said *John Cook*.

PORT'S CASE.

The only variation in the statement of this case from the last was that *Port*, who was also an agricultural labourer, and a married man, having four children, had not actually received parochial relief, but on one occasion, viz., in the year 1873, he had applied for it, but it was refused by the board of guardians, who were of opinion that he did not need it.

The decision of the Revising Barrister, and the question reserved for the Court, were the same as in the former case.

[The facts of the above two cases being so nearly identical, they came on together for argument.]

Arbuthnot, for the appellant in each case. The question to be determined here is, what are the description of "alms" which come within sec. 36 of the 2 Will. 4, c. 45, so that the person who receives them will be thereby disqualified from exercising the borough franchise? Looking to the words of the section, we find that the disqualification arises either from the receipt of "parochial relief," which here is not suggested, or from the receipt of "other alms, which by the law of Parliament now disqualify from voting:" so that in order to determine what alms disqualify, it is necessary to examine what was previously the law of Parliament on the subject, and on what principle the disqualification has been based. The question has been already raised, and to some extent argued in *Stowe* v.

1876.

HARRISON v. CARTER. COOK'S CASE. PORT'S CASE.

Jolliffe (*a*), in reference to similar distributions of the same charity; but the facts in reference to the point now before the Court were not then fully stated, and the decision proceeded on another ground. It is true, no doubt, that in order to ascertain what the law of Parliament has been, it is necessary to refer to the decisions of the Committees of the House of Commons, which will be found collected in *Rogers on Elections*, 12th ed. pp. 213, 214. But it is useless to deny that to a considerable extent those decisions are in conflict with one another, and that it is difficult, if not impossible, to extract from them what has been the governing principle. The true ground on which the disqualification proceeds is to be found, as is submitted, in the following passage from *Rogers on Elections*, 12th ed. p. 210: —"Persons who are, or who have been within a certain time obliged to depend, wholly or in part, on eleemosynary assistance, have been held by *Whitelock* and other writers to be disqualified by the common law, not only because from their indigence they were unable to contribute to the wages of their members, but *because from their dependent situation their voices were no longer free.*" It is true that at p. 214 of the same work it is also said: "In those of the old boroughs, where the usage is not clear, and in all the new boroughs, it seems to be a general principle with regard to charitable foundations and endowments, that those only disqualify whose funds form a part of the general parish resources for the relief of the poor, and are managed by the overseer, or other officer, whose duty it is to provide for and pay the paupers, in the same manner as if the funds had been

(*a*) *L. R.* 9 *C. P.* 734.

the produce of the parish rates." It is submitted, however, that that passage is inconsistent with the passage already cited, and also with the judgments of the Court of Common Pleas in *Smith* v. *Hall* (*a*), which certainly lay down a more sound principle for ascertaining what description of alms will operate as a disqualification. In that case, *Williams*, J., in giving judgment, cites, with approval, the following passage from *Heywood on County Elections*: "A distinction may be made between charities which are of such a nature as to imply that the partaker is in a state of indigence and abject dependence, and those which afford no such inference, or from which a contrary one may be drawn." In *Smith* v. *Hall* (*a*), which was the case of an incorporated charitable institution, it was held that the members were not disqualified by taking the benefits of the charity, inasmuch as they had a permanent right to participate in its revenues, and were not, therefore, in the receipt of alms, so as to affect their franchise. But the ground on which that decision proceeded was, that the effect of a permanent participation in the benefits of the charity was to give additional independence to the voter, whereas here precisely the converse reasoning applies, viz., that the almost certain operation of this charity must be to create and foster in the recipients a state of abject dependence. How, indeed, can it be expected to be otherwise, where the poverty of the recipient is the only condition indispensably necessary to bring him within the terms of the distribution, while the granting or withholding of it *in toto*, as well as the apportionment of it among those to whom grants are made, is

(*a*) 33 *L. J., N. S., C. P.* 59; *S. C. Hopw. & Ph.* 11.

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on every occasion in the arbitrary discretion of the trustees in whom the funds are vested?

Anstie, for the respondent in each case. The burden of showing that the disqualification exists is on the appellant. It is true that by the terms of the will under consideration the distribution is to be made among "the poorest inhabitants of the tything." And it must therefore no doubt be assumed that each of the recipients of this charity is a poor inhabitant within that description. But, on the other hand, it must equally be assumed on the findings of the Revising Barrister that the poverty of these recipients was not so great but that each of them was in every respect entitled to the franchise, unless his acceptance of this sum of 12*s.* 6*d.* has the effect of disentitling him. Alms which by the law of Parliament disqualify must, it is submitted, according to the authorities, be alms which form part of, or stand in place or subvention of the poor-rate. *Reg.* v. *The Mayor of Lichfield* (*a*) is an express authority upon the construction of similar language in sec. 9 of the Municipal Corporations Act (5 & 6 Will. 4, c. 76), which is the corresponding enactment for disqualifying persons who have received "parochial relief or other alms" from being enrolled as burgesses. In construing that section the Court unanimously held that the word "parochial" applies to "alms" as well as to "relief," so as to restrict the alms which disqualify to those which are in their nature parochial. *Rex* v. *The Inhabitants of Halesworth* (*b*) throws light on the subject under discussion. That case determined that a charitable fund similar to

(*a*) 2 *Q. B.* 693. (*b*) 3 *B. & Ad.* 717.

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the present, even when administered by the churchwardens and overseers, was not a "public parochial fund" within 56 Geo. 3, c. 139, s. 11, if the duty of those officers was to administer the fund in the capacity of trustees subject to the control of the Court of Chancery, and not in relief of the general parish funds. *Lord Tenterden*, C.J. there said: "It," viz., the fund in question, "is not meant to go in relief of the general parish fund, or, if so, only to a moderate extent. It does not appear that the intention was to relieve persons actually burdensome to the parish; there might be persons . . . objects of this charity, who yet did not require parochial support; and in such cases the fund would be no relief to the parish." That reasoning applies to the present charity, and to each of the cases now before the Court.

[LINDLEY, J., referred to *The Bishop of Hereford* v. *Adams* (*a*) as to the construction put by Lord *Eldon* on a bequest in trust for "poor inhabitants."]

The tests that have been suggested on the other side for ascertaining what alms disqualify are two, viz., poverty in the recipients, and discretion in the trustees, but those are not tests that Parliamentary Committees have ever adopted; and, if not, they can hardly form a safe guide as to what the law of Parliament on this subject has been. Substantially, the Committees have adhered to the rule, already referred to by the other side, as being unsound, but which is distinctly laid down in *Rogers on Elections* (*b*), viz., that in the absence of a contrary usage clearly established, the charitable gifts of

(*a*) 7 *Ves.* 330 (*b*) 12*th ed. p.* 214.

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those endowments only disqualify, "whose funds form a part of the general parish resources for the relief of the poor, and are managed by the overseer, or other officer." Cases that appear to conflict with that rule may be explained by the usage of the particular borough. Notably so in the *Taunton case* (*a*). Moreover, the objection has always been regarded unfavourably by the Committees, and as not to be extended, and especially has this been the case in the more recent decisions. If the Court should be of opinion that the cases cannot be reconciled, then it is submitted that the more recent decisions should prevail. The *Downton case* (*b*) may be referred to as one among several in favour of the respondent, which is not distinguishable from the cases before the Court; while in a note to the *Bedford case* (*c*), it is pointed out that the case of *Welborn's Charity*, where the vote was disallowed, has been overruled both by the *Colchester case* (*d*) and by other decisions.

Arbuthnot, in reply. Reliance having been placed on the decisions of the Committees, it is right to call attention to the *Aylesbury case* (*e*) as in point for the appellant. But in truth, as has been already stated, the decisions referred to are incapable of being reconciled. The construction put by the Court of Queen's Bench in *Reg.* v. *The Mayor of Lichfield* (*f*) on the language of sec. 9 of the Municipal Corporations Act, has also been relied on. But in that case Lord *Denman* in giving judgment expressly pointed out that the Court were not disposed to construe that section by the light of sec. 36 of the

(*a*) 1 *Doug.* 367—373.
(*b*) 1 *Lud.* 193.
(*c*) 2 *Dougl.* 122.
(*d*) 1 *Peck.* 510.
(*e*) 12 *Journ.* 490, cited 2 *Doug.* 126.
(*f*) 2 *Q. B.* 693.

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Reform Act. With regard to the construction put upon the words "poor inhabitants" in *The Bishop of Hereford* v. *Adams* (*a*), it is to be observed that here the trust is for the "*poorest* inhabitants," which would not, it is submitted, have the same effect of excluding those who are in receipt of parochial relief.

LORD COLERIDGE, C.J. The question in these two cases turns on the construction to be placed on the 36th section of the 2 Will. 4, c. 45. That section enacts, that no person shall be entitled to be registered in any year as a voter for any city or borough, "who shall within twelve calendar months next previous to the last day of July in such year have received parochial relief or *other alms which by the law of Parliament* now disqualify from voting in the election of members to serve in Parliament." And the point we have to determine is, What are "alms" which disqualify within the meaning of that enactment?

The question arises in both cases under the same clause in a will creating a trust in favour of the poor of the tything of *Weston*, the trust being expressed in the following terms: "Upon trust and confidence, and to the intent and purpose, that all the yearly rents, issues, and profits of the said messuage, land, and premises, shall be employed and disposed of for ever hereafter, for the putting forth and placing abroad of all such poor children of the tything of *Weston* aforesaid; and the overplus thereof shall be distributed unto the *poorest inhabitants of the said* tything of *Weston* aforesaid *as my said trustees and their assigns shall think fit.*" The case finds that the overplus generally amounts to

(*a*) 7 *Ves.* 330.

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about £40, which is distributed every year amongst about eighty of the labouring population, according to the discretion of the trustees, in sums varying from 2*s.* 6*d.* to 12*s.* 6*d.*, according to the necessities of the recipient and the number of his family: that personal application is not made to the trustees, but that they make inquiry for themselves, and decide who are fitting recipients of the charity: that each of the respondents received in the present year 12*s.* 6*d.* (the largest sum granted), and was a proper recipient: that each is an agricultural labourer, and married, the one having five and the other four children: that one had formerly received parochial relief, and the other had applied for it, but in neither case during the qualifying year. It is manifest, therefore, from the statements in the case that during the qualifying year each had received alms, though not parochial relief, and the dry question for us is, whether or not the alms so received are alms, "which by the law of Parliament now disqualify" within the meaning of the above-mentioned enactment.

Now the law of Parliament at the time of the passing of the Reform Act must mean the law as it was administered by Committees of the House of Commons; and if we can extract from any decision of those Committees, or, after their jurisdiction was transferred to the Court of Common Pleas, from any decision of that Court, any principle which has governed the decisions on this question, we are bound to follow it; but in the course of the argument it has been pointed out that as regards the decisions of the Committees there is so much conflict between them that it is extremely difficult to extract the governing principle; while in the Court of Common Pleas, since the transfer of the jurisdiction

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to that Court, there is very little authority to be found on the subject. In the case of *Smith* v. *Hall* (*a*), however, though not precisely in point as a decision, we do find something like a principle suggested by Mr. *Welsby* in his argument, which to some extent, at all events, is adopted by the Court in their judgments. That a fellow of a college at Oxford or Cambridge is not disqualified by participating in the revenues of his college is of course clear, although in one sense he may be said to be in receipt of alms by reason of the original eleemosynary character of those institutions. In *Smith* v. *Hall*, we find Mr. *Welsby* insisting "that each hospital is a corporation, of one or other of which the voters are members, and the whole proceeds of each corporation is divided among the members. They are not dependent on the caprice or good will of any person whatever for their share of the benefits; and altogether it is difficult to imagine persons in a more independent position." Chief Justice *Erle*, in giving judgment, said: "If we look to the meaning of the enactment in question, I think it will be evident that the reason why the persons there mentioned are disqualified is, because it is considered that, from being so situated, they are likely to be subservient, and not to have that independence which a workman ought and might be expected to have. But I take it that these persons, having a house of their own, and a share in the proceeds of certain lands for life, would in all probability be more independent than many persons who have nothing to subsist on but the profits of their own labour." And *Williams*, J., in giving judgment to the same effect, said: "*Shepherd*, an able and accurate writer, in his

(*a*) 33 *L. J., N. S., C. P.* 59; *S. C. Hopw. & Ph.* 11.

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work on *Elections* (2nd ed. p. 5), adopts the very words of Serj. *Heywood*: 'A distinction may be made between charities which are of such a nature as to imply that the partaker of them is in a state of indigence and abject dependence, and those which afford no such inference, or from which a contrary one may be drawn.' *Heywood on County Elections* (2nd ed. p. 278)." The principle on which in that case it seems to have been held that the recipients were not disqualified was, that the situation in which they were placed was not one of indigence and dependence, and the converse proposition seems also to follow from the judgments, viz., that if it had been one of indigence and dependence, that circumstance would have operated to disqualify them. In the present case, by the express terms of the trust, the distribution is to be made among "the poorest inhabitants of the tything," and at the absolute discretion of the trustees; and the recipients of this charity who are now seeking to qualify as voters are persons who from their necessities are on the verge of coming upon the parish. It must be obvious that this is just the kind of charity of which the funds are capable of being misapplied in a way which would contravene the intentions of the Legislature, by interfering with the freedom of the electoral franchise, and that the recipients are just of that class of persons who are peculiarly liable to the temptations against which this enactment may be presumed to have been passed. In short, if these persons are not in receipt of alms within the enactment, it is difficult to say who is. As to the construction which the Court of Chancery would put on the words "poorest inhabitants," in this bequest, I express no opinion. For the purpose of this case, it is enough to say, without laying down any

general formula which would embrace all cases, that both these persons were in the receipt of alms, which by the law of Parliament disqualified them from voting, and, consequently, that the decision of the Revising Barrister must be reversed.

LINDLEY, J. I am of the same opinion. Upon the findings of the Revising Barrister it must be taken that both these persons were qualified as voters, unless they were disqualified by having within the prescribed period received alms within the 30th section of the Reform Act. In neither case had they received "parochial relief" within that period, so that the question is—had they received "other alms"? If the sentence had stopped at the words "other alms," I should have thought that they clearly had; but the difficulty arises from the words not being simply "other alms," but "other alms which by the law of Parliament now disqualify from voting." The Legislature assumes that there was a law of Parliament on the subject, so that we cannot say there was none; but the cases being in conflict, it is not easy to extract from them the principle on which it was based. One principle, suggested on the part of the respondent, was that alms, in order to be brought within the Act, must be alms distributed by the parish authorities; but I cannot think it sound in principle that the disqualification should depend on the character of the trustee by whom the alms are distributed. The other principle is to look at the position in which the recipient stands, and see whether it is one which renders him dependent on the trustee for the benefits of the charity. The case of *Smith* v. *Hall* (*a*)

(*a*) *Hopw. & Ph.* 11; *S. C.* 33, *L. J., N. S., C. P.* 59.

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shows that where the recipient has a permanent right to the benefits he receives, that places him in a position of independence, and his poverty alone will not disqualify him. But here not only are alms received, and on the ground of poverty, but in the position of the recipient there is the absence of that independence which it was recognized in *Smith* v. *Hall* (*a*) that a voter ought to possess. I agree that the burden of proving the disqualification lies on the appellant; but in the present case I think the disqualification proved.

Decision reversed.

Attorneys—For Appellant, *F. L. Soames*, for *J. Soames, Petersfield.*

For Respondent, *Rogers & Ford*, for *Albery & Lucas, Petersfield.*

(*a*) *Hopw. & Ph.* 11; *S. C.* 33 *L. J., N. S., C. P.* 59.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

UNDER THE STAT. 6 VICT. c. 18,

IN

MICHAELMAS TERM, 1877.

IN THE

FORTY-FIRST YEAR OF QUEEN VICTORIA

PHILLIPS, Appellant; SALMON, Respondent.

1877.
Nov. 19.

The claimant of a freehold county vote claimed in respect of land, to him by the lord in 1861 for three lives, with a covenant to add a life on each of the first two deaths. Similar leases had been granted since 1838, but there was no evidence of such leases previously. From time immemorial the burgesses of N. had exercised rights of common of pasture over the waste, but for 100 years and upwards it had been the practice at their Courts Leet and Courts Baron for the mayor and burgesses to present to the lord individual burgesses for occupation of pieces of the waste, most commonly with the addition, after naming such burgess, "he to agree with the lord for the rent." In all cases the persons so presented took possession of the land, generally building cottages and other buildings thereon, and paid the rents to the lord which he had fixed, such rents being very small sums varying according to circumstances. No duration of holding was specified in such presentments, but upon the death of the person presented, his personal representatives continued to occupy and pay rent to the lord without further reference to the Court Leet. The claimant was presented to the three plots of land comprised in his lease in 1841, 1852, and 1855 respectively, and had retained possession and paid rent to the lord until the present time, in accordance with his lease. Held (no question of value being raised) that the claimant had a good freehold qualification vested in him by the lord, and that as regards the commoners the claimant could not at all events be disturbed by them during his own lifetime.

AT a Court holden for the revision of the lists of voters for the county of *Pembroke* on the 26th of September, 1877, at *Newport*, in the said county, before one of the Barristers appointed to revise the said lists,

formerly part of the waste of the manor of N. under a lease granted

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John Phillips duly objected to the name of *John Salmon* being retained in the list of voters for the said county.

2. The name of the said *John Salmon* appeared in the list of claimants to be entitled to vote for the said county as follows :—

Name.	Abode.	Nature of Qualification.	Street, Lane, &c.
Salmon, John	Blaenwarrn	Freehold lease of house and land.	Blaenwarrn

3. In support of the said claim the claimant produced a lease duly executed, dated the 28th of February, 1861, whereby *Thomas Davies Lloyd*, Esq. (afterwards Sir *Thomas Davies Lloyd*, Bart.), in the said lease described as lord marcher of the barony of *Kernes* in the said county of *Pembroke*, demised to the claimant, his heirs and assigns, the dwelling house, outhouses, garden and lands called *Blaenwarrn*, which premises were described as situate at *Newport*, in the said barony of *Kernes*, reserving to the lessor, mines and minerals, with the ordinary powers for working the same, to hold to the claimant, his heirs and assigns, during the lives of his son, daughter and grandson, therein respectively named, and the survivors and survivor of them, at a yearly rent of 5*s*., payable to the lessor, who also thereby covenanted with intent so as to create a lien upon the reversion of the demised premises, and all persons who should become entitled thereto, but not to create any personal charge upon the said lessor, his executors or administrators, that he, his heirs or assigns, would grant unto the claimant, his heirs or assigns, a lease for adding a life on the said premises to be named by the claimant, his heirs or

assigns, upon the death of such one of the lives therein named as should first drop, and also a further lease for adding a life on the said premises upon the death of such one of the survivors of the lives therein named, and the additional life as should first drop, in manner therein mentioned.

[A copy of the lease was to form part of the case.]

4. The question on this appeal was whether the said *Thomas Davies Lloyd* had power to grant the said lease for the lives of the persons therein named, or any of them, and in manner thereby appearing so as to create the qualification in respect whereof the said *John Salmon* claimed.

5. No witnesses were called, nor any further documentary evidence given before the Revising Barrister, but the following facts were agreed upon between and by the said parties and their advocates and agents in reference to the said claim.

6. The site of the dwelling house and land aforesaid called *Blaenwarrn* were formerly part of the waste of the manor of *Newport*, which manor is conterminous with the borough and parish of *Newport*. The barony of *Kernes* comprises several manors, one of which is the said manor of *Newport*, and the barony also comprises twenty-six parishes, of which the said parish of *Newport* is one.

7. At the time of granting the said lease, the said *Thomas Davies Lloyd* was lord of the barony of *Kernes*, and as such lord of the manor of *Newport*. There are no copyholds in the said manor.

8. The borough of *Newport* is governed by a mayor and burgessess, who have from time immemorial held Courts, called Courts Leet and Courts Baron, for the

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borough. At one of such courts holden annually on the 29th of September, it has been the custom for the burgesses to present three of their number, one being the mayor in office at the time, for the office of mayor for the following year. These presentments were delivered to the lord, who thereupon elected one of such persons presented to him, and such person was thereupon sworn into office as mayor.

9. By a charter dated A.D. 1192, *Nicholas Fitz-martin*, then lord of the said barony, confirmed to his burgesses of *Newport*, then called *Newburgh*, certain liberties and customs which *William*, his father, had granted to them, and amongst others that they should have common of pasture in his land and easement of wood for their houses and buildings and for firing by view of the forester; likewise that they ought to have a bailiff and a common council for him and them. This charter was exemplified and enrolled by the Justices of the Great Session holden at *Haverfordwest* in the 34th year of the reign of Queen *Elizabeth*, on the application of the bailiff and burgesses of the said town of *Newport*, and it was again similarly exemplified and enrolled in the 5th year of the reign of *James* the First.

10. At the Courts Leet and Courts Baron it has been the practice of the mayor and burgesses for 100 years past and upwards to present to the lord individual burgesses for occupation of pieces of the common or waste lands, and most commonly with the addition, after naming such burgess, "he to agree with the lord for the rent." In all cases the persons so presented took possession of the apportioned plots of land, generally building cottages and other buildings thereon, and

paid the rents to the lord which he had fixed, such rents being very small sums varying according to circumstances. No duration of holding was specified in such presentments, but upon the death of the person presented his personal representatives continued to occupy and pay rent to the lord without further reference to the Court Leet.

11. In the year 1838, disputes having arisen between the lord and certain of the persons holding under the above-mentioned circumstances as to their liability to pay the said rents, the lord took proceedings to recover such rent from one of them and recovered the amount thereof in an action tried at the assizes.

12. Since the date of such trial the successive lords of the said barony have granted many leases similar to that under which the present claim is made, and the lessees have taken possession of the plots demised by such leases and have paid the rents thereby reserved. There was no evidence that such leases had been granted previously to such date, nor has any notice been taken of such leases on the Court Rolls.

13. During the time that the said *Thomas Davies Lloyd* was lord of the said barony, extending from the year 1845 to the present year, the records of the said Courts Leet and Courts Baron were headed as follows:

"Town and corporation of *Newport* in the county of *Pembroke*, barony of *Kernes*, whereof Sir *Thomas Davies Lloyd* is lord of the corporation. The Court Leet and Court Baron held at *Newport* within the said barony.

"Before me,

"A. B.,

"Mayor."

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14. The original presentment to the claimant of part of the said lands in respect of which he claimed as aforesaid was made in the customary form by the jury at the Court Leet holden on the 14th of May, 1841, and was in the words following:

"We present two pieces of ground on the common to *John Salmon*, weaver, northwards and westwards of *Yetyrhose*, admeasurement about 60 yards long by 30 yards, he to settle with the Lord of the Manor for the rent."

15. A further part of the said lands was presented to the said claimant by the jury at a Court Leet holden on the 26th of November, 1852, and such presentment was in the words following:

"We present to *John Salmon* of *Blaenwarrn* a piece of land on the common bounded, &c. (mentioning the abuttals). The Mayor will mark out the boundaries. The said *John Salmon* to settle with the Lord of the Manor for the rent. Received sixpence in Court on account of rent."

Then follow the names of the said jurors.

16. A further part of the said lands in respect of which he claimed was presented to the claimant by the jury at a Court Leet holden on the 6th of November, 1855, and such presentment was in the words following:

"We present to Mr. *John Salmon* of *Blaenwarrn* all that piece or spot of land being part of *Newport* common and situate near a house and garden the property of *Thomas Davies Lloyd*, Esquire, the said spot or piece of land to be of the extent of 60 yards by 30 yards, or thereabouts. The said *John Salmon* shall not encroach or stop up any public roads, and shall settle with the Lord of the Barony for the rent of the same

spot of land. The Mayor, accompanied by Mr. *John Llewellyn*, Mr. *Thomas Bevan*, Mr. *John Harris*, and Mr. *William Salmon* are hereby directed to mark out the boundaries. Mr. *John Salmon* has on this day paid on account of rent the sum of one shilling."

Then follow the names of the jurors. The said sums of sixpence and one shilling paid on account of rent by the said claimant were received by the steward as part of the rent to be fixed by the lord of the manor to be paid for the said plots of land respectively.

17. The lease executed by the said *Thomas Davies Lloyd* to the claimant in manner aforesaid included the said several pieces of land referred to in the three presentments hereinbefore recited, and included no additional or other land, and possession has been retained by him and rent paid to the lord until the present time, in accordance with the said lease.

18. The burgesses of *Newport* have from time immemorial exercised rights of common of pasture over the wastes of the said manor of *Newport*. Such wastes consisted originally of 3000 acres or thereabouts within the said manor, of which, in the year 1861, about 300 acres had been enclosed and were then held in severalty under the presentments hereinbefore referred to, but a sufficiency of such waste lands was then and still is left for the use by the commoners of their said right of pasture. No right of turbary or estovers has been exercised by the burgesses, and there is no turf or trees within the said waste lands available for the user of either of the last mentioned rights, if they exist.

19. It was contended for the claimant that the lord

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had a right to approve against common of pasture, leaving sufficient waste for that purpose, and if so, that he had also a right to demise the lands so approved, and that there were no other rights of common in this manor; moreover, that a custom so to demise was proved by the foregoing facts. It was answered for the objector that no right to demise could be incidental to the right to approve without a custom, and that such custom was in this case only recent and not of legal origin.

The Revising Barrister decided that the contention of the claimant was well founded, and inserted the name of *John Salmon* in the list of claimants. If the Court should be of opinion that the Revising Barrister's decision was wrong the register was to be amended by erasing the name of *John Salmon* therefrom.

Grantham, Q.C. (*Vernon Smith* with him) for the appellant. First as regards the nature of the right of common vested in the burgesses of *Newport*. The nature of the right is clearly common in gross, and not common appendant or appurtenant. Common of pasture is no doubt mentioned in the 9th paragraph, but the "houses and buildings" mentioned in the same paragraph are not mentioned in connexion with the "common of pasture," but with the "easement of wood" which, as the case states, is for "house and buildings" and for "firing." Assuming, therefore, what will not, it is believed, be contested, that the right of common in the burgesses is a right to common in gross, the next proposition rests on what is well settled law, viz., that neither at common

law (*a*), nor under the statute of *Merton* (*b*), can the lord approve *against common in gross*. The respondent must therefore establish by proof the existence of a custom. Here no proof exists of any ancient custom, or at all events of any such custom as will support the lease which has been granted to the respondent. The earliest leases in the present form, of which the case states that there is any evidence, are subsequent in date to the year 1838.

[LINDLEY, J. The custom to approve was a good deal earlier.]

The lord can only approve in strict accordance with the custom. He cannot approve for his own benefit without reference to the rights of the commoners, as ascertained by the custom. The nomination and presentment by the commoners of one of their own number to a piece of land was an act done by the commoners by arrangement among themselves and for their own benefit, although no doubt the presentee had subsequently to his presentment to settle with the lord as to the amount to be paid to him for rent. But the presentment being the act of the commoners, it is competent for them by holding a meeting at any time to determine the interest which they have themselves created in their presentee. An interest originating in such a presentment is widely different from a freehold interest created by a grant from the lord without any reference to the rights of the commoners, or recognition of the existence of any such rights. The 10th paragraph shews, it is submitted, that according to the

(*a*) See 2 *Inst.* 474 *n* (2); *Elton on Commons and Wastes*, p. 196, 198—200.

(*b*) 20 *Hen.* 3, c. 4. See 2 *Inst.* 86 *n.* (4), 475 *n.* (4).

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customary mode of presentment the interest of the presentee was not freehold.

[LINDLEY, J. The 10th paragraph speaks of personal representatives continuing to occupy upon the death of the person presented. The interest created under the customary presentment plainly did not cease upon the death of the presentee; but how long did it continue in the personal representatives? Is not the custom consisent with a tenancy *pur autre vie*, the personal representatives taking as special occupants?]

There is nothing in the statement of the custom to justify the inference that a presentment under it created a tenancy *pur autre vie*. All that the Court is justified in assuming from the statements in the 10th paragraph is that the presentee, instead of being turned out when he died, had an interest of some sort which went to his personal representatives. Although the case does not state with precision the duration of the presentee's interest, the Court will not assume it to be freehold in the absence of some statement which clearly warrants that assumption. The case expressly states that there was no evidence of the granting previously to 1838 of any leases similar to that which has been granted to the respondent.

[DENMAN, J. Is it not for you to get rid of the presumption that arises in favour of possession? Consistently with the statements in this case, may not the lord in granting this lease have acted within his powers with the consent of all parties?]

The lease does not purport to be made with the assent of the commoners, and though there may be

nothing on its face which in terms shews their dissent, if they had been assenting parties, their assent would have appeared. So also, as regards the duration of the lease, if leases for lives had been made before 1838, that circumstance could have been affirmatively shewn.

[LINDLEY, J. The lease is surely good, at all events, as against the lord. It may be that the land is subject to certain rights in the commoners; but the case does not raise any question of value.]

The case, it is submitted, has been stated to raise the question whether the lord had a right to approve, which the Revising Barrister decided in the affirmative. If the lord had no right to approve, the name of the respondent should be erased from the register. In *Elton on Commons and Wastes*, p. 238, it is said: "If an owner of land has by deed granted to a stranger the right of taking peat or turf for fuel, wood for repairs, fish for the sustenance of his family, or other profits of a similar kind, out of a particular parcel of waste land or a stream where these may be found, without attaching the privilege to the ownership of any particular tenement, it seems to be clear that he cannot afterwards restrain the commoner to any lesser portion of the waste or stream. We know that from the earliest times enclosures were forbidden when a common of pasture in gross had been granted in this way (*a*), and the same rule applies to other kinds of common in gross; thus where one had granted a common of piscary through every part of a certain stream, and then excluded the commoner from part of the

(*a*) 12 *Hen.* 3, 25; 2 *Inst.* 474 *n.* (2); 1 *Ro. Rep.* 365.

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same on the formation of a mill-stream, on assize of common being brought, it was held that no such alteration of his grant was permissible (*a*)."

[He referred also to *Lascelles* v. *Lord Onslow* (*b*).]

Sir *Henry James*, Q.C. (*Tickle* with him) for the respondent. The ownership of the soil in this barony is unquestionably in the lord, the interest of the burgesses of *Newport*, as tenants of the manor, being limited to rights of common of pasture, which rights it is not denied are, as regards their nature, rights of common in gross. Then as to the three plots of land in respect of which the vote is claimed, what do the facts establish? They clearly show that the respondent has been in possession for above twenty years without interference by any one. Since 1861 the possession has been under a lease purporting to pass a freehold interest; that lease is valid in point of form, and rent has been paid under it since its commencement in accordance with its terms, and its validity has hitherto never been disputed. The possession prior to the lease dates from the presentments to the three plots respectively in 1841, 1852, and 1855. The first question therefore which arises is, whether even assuming that any tenable objection could now be raised by any parties having an interest in the premises, it is competent to the political objector to raise it. The proposition is a startling one, and affords an easy opportunity for a side attack on a property, if the lawfulness of possession is not to be presumed, when all parties who could be interested in objecting have always acquiesced,

(*a*) 34 *Assis.* 11; *Bro. Abr.* '*Common*,' 26.

(*b*) 2 *Q. B. D.* 433.

and still acquiesce in its perfect lawfulness. Assume, however, that the political objector is competent to object. What is the nature of the objection? The respondent claiming by more than twenty years' possession; can it be an answer to say that he is in under a lease which no one had power to grant, even assuming for the moment that that view can be substantiated?

[LINDLEY, J. It is competent for anyone to say that he was let in under a custom.]

The difficulty as regards the custom is to say what determination there is to the interest that is created under it. If it be said that the custom is bad, then the respondent has a good title by more than twenty or even thirty years' possession. He cannot the less have a freehold interest, because subsequently to being let into possession he has obtained from the lord what purports to be a freehold lease. If on the other hand the custom is good, then the respondent is at all events lawfully in possession under the custom. The only parties besides the respondent who have any interest in the question are the commoners and the lord. The commoners, lawfully assembled, have in the customary mode presented the respondent to the land. They cannot indeed confer possession of the soil by their presentments, the soil being in the lord. All that they can do is to say: "With consent of the lord, who is owner of the soil, you may go in and take possession, we giving up our rights." But here the respondent does obtain the lord's consent to his possession, the lord granting him a freehold lease. Unless therefore it can be held that the effect of these presentments is necessarily to restrict the lord to the creation of a

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yearly tenancy, there is nothing to prevent the lord from creating a tenancy for such term as he may choose. That the tenancies are longer in one case than another affords no proof than the longer tenancy is invalid. Is it to be said that no variation in the duration of the tenancy is permissible under the custom? Or that the duration of the tenancy might not be either for a week or a year, as arranged between the lord and the tenant? The lord has clearly power under the custom to create a tenancy, and why should its duration be thus arbitrarily restricted? And where is the evidence of any such restriction to be found? It is for the objector to shew it, if it exists. It cannot be gathered from the forms of presentment, which are absolute in their terms; and certainly not from the usage, since there is no instance of any land, to which a presentment has once been made, having ever again become subject to the rights of the commoners.

[DENMAN, J. Whether the language of the presentments be legal or not, I take it so far as regards intention that the meaning of the words was to put it in the power of the lord to make over the land for ever.]

It is submitted that that was clearly the intention. The object in view was that houses should be built, and additional value thus given to the surrounding land, which belongs to the lord. The substance of the transaction is that the commoners present the individual to have so far as they are concerned the right of enclosure for ever. It is an absolute presentment (if the lord will) to enable the lord to establish a tenancy between himself and the presentee of the

commoners, and to free the land as to which the presentment has been made once for all from the rights of the commoners. A contrary doctrine would put on end to all building improvements throughout the manor, and stop the increase of population which has taken place under the custom. The custom of leasing in the present form has taken place since 1838, and although prior to that date it may be that the lord may have acted on the principle of granting shorter leases, the Court will not infer from that alone that the granting of leases in the present form cannot be an act in accordance with the custom.

[He also referred to *Shakespear* v. *Peppin* (*a*).]

Grantham, Q. C., in reply. It has been argued for the respondent that this objection is not open to a political objector; but, if the objection be legally sustainable, there is no reason why it should not be raised on a question of the franchise, as well as if it arose in any other way.

[*Denman*, J. Sir *Henry James* says, possession is *primâ facie* evidence of ownership of the land. The respondent claims the land by virtue of his possession, and says that you have not shewn any right to dispossess him.]

The case has no doubt been argued for the respondent as if that were the point raised. But the point raised by the Revising Barrister is not whether the respondent has been in possession under a custom under such circumstances as to afford evidence of the

(*a*) 6 *T. R.* 741.

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existence of some kind of freehold estate. If that view were sustainable on the facts, it would no doubt have been distinctly raised by those who watched the preparation of the case on behalf of the respondent. Instead, however, of raising that point they have been content to rely on the proposition that the lord has a right to approve, and that, having that right, he has also the right to grant leases for lives. Now, as regards approvement, it has not been attempted on the other side seriously to argue that under the statute of *Merton* the lord can approve against common in gross, and the authority of Lord *Coke* is distinct that he cannot (*a*). It follows that the power to grant leases for lives in the form which has been here adopted, if it exist, must depend wholly on user, and that user the case shews to be of modern origin.

[He referred also to *Arlett* v. *Ellis* (*b*), and *The Bishop of Chichester and Strodwick's Case* (*c*).]

DENMAN, J. I think that the respondent is entitled to judgment. Many points have been touched upon in the course of the argument which might give rise to difficulty, if the facts of this case did not dispose of them. The case really turns on paragraph 10, which is as follows: "At the Courts Leet and Courts Baron it has been the practice of the mayor and burgesses for 100 years past and upwards"—which in the absence of anything to the contrary I read as equivalent to a statement of "from time immemorial"—"to present to the lord individual burgesses for occupation of pieces of the common or waste lands, and most

(*a*) 2 *Inst.*, 86 *n.* (4); 474, 475.
(*b*) 7 *B. & C.* 346.
(*c*) *Godb.*, p. 234.

commonly with the addition after naming such burgess 'he to agree with the lord for the rent.' In all cases the person so presented took possession of the apportioned plots of land, generally building cottages and other buildings thereon, and paid the rents to the lord which he had fixed, such rents being very small sums varying according to circumstances." Now here no question of value arises, but it must be assumed that, subject to the point of law stated, there was a sufficient value in the holding to give the respondent a vote. Paragraph 10 proceeds as follows: "No duration of holding was specified in such presentments, but upon the death of the person presented his personal representatives continued to occupy, and pay rent to the lord without further reference to the Court Leet." That, I think, amounts at all events to a statement of this, that from time immemorial the tenants of the manor have agreed, and by their presentments acted upon agreements, that the individual whom they presented should take the land, and the lord let to him (he paying rent to the lord) for the period at least of the presentee's life.

As to what would happen upon the death of the presentee with regard to the personal representatives no question arises, because *Salmon* the respondent is the person who was presented to a portion of the land as early as 1841, and to other parts afterwards, and subsequently he has taken a lease from the lord. With the consent of the burgesses he has held and continues to hold the land from the lord, and to pay rent to him.

I think, therefore, that sufficient is made out to give the respondent the qualification. He holds land, as to

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the sufficiency of which in point of value no question arises, for the period of his natural life at least, from the person in whom, at the time when he took, the freehold of the land was vested. There are therefore all the elements of qualification for a county vote. The existence of the lease cannot I think render the respondent less entitled to the vote than he would have been according to the statement of the custom. The decision of the Revising Barrister must therefore be upheld, and the appeal dismissed.

LINDLEY, J. I also am of opinion that the respondent is entitled to judgment. In determining a case of this sort, two questions have to be considered either by the Revising Barrister or by the Court. First, is there the necessary qualification in point of law? Secondly, is it sufficient in point of value? Now the qualification in respect of which the respondent claims is a freehold lease of a house and land. Has the respondent got that qualification? Beyond all doubt he has. He has a lease for lives from the lord of the manor, who must be assumed to be the owner in fee of the land, as there is nothing in the case to cut down his interest. The respondent has therefore a freehold interest, created by a person who can give it. All that can be said against that is that his interest is subject to certain rights of common. I do not propose to discuss what the exact rights under the lease may be against the commoners. It is quite obvious that the lease is good against everybody else, and against the commoners it is good to this extent at least, that they cannot disturb the respondent in his lifetime. That is plain from paragraph 10. It comes

therefore to a question of value, and as to that the case does not raise any question for us as to its sufficiency.

Decision affirmed,

Solicitors—For Appellant, *Peacock & Goddard*, for *Jenkins & Evans, Cardigan.*

For Respondent, *Cookson, Wainewright, & Pennington.*

GRANT, Appellant; THE OVERSEERS OF THE PARISH OF PAGHAM, Respondents.

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To work a disqualification under sec. 43 of the Parliamentary Elections Act, 1868, the report made to the House of Commons by the election judge must state expressly or at all events so as to leave no room for doubt, that bribery has been committed by or with the knowledge and consent of the candidate. If the report be on its face ambiguous, the observations made by the election judge in delivering his judgment in the election petition cannot be resorted to, for the purpose of clearing up the ambiguity.

THE appellant claimed to have his name inserted in list of voters for the western division of the county of *Sussex*, in respect of certain freehold property, and was duly objected to by one *Eugene Edward Street*.

The claim was heard before the Revising Barrister at the Court holden for the said western division at *Bognor*, on the 1st day of October, 1877, and the appellant was proved to be duly qualified in respect of his said claim, unless the objection put forward by the said *Eugene Edward Street*, and mentioned in the next paragraph should be decided to be valid.

The said objection was, that, the appellant having been returned by the Returning Officer for the borough of *Kidderminster* as having been duly elected on the 31st day of January, 1874, to serve in Parliament for the said borough, a petition had been presented against such election and return, and at the trial of the matters alleged in such petition before Mr. Justice *Mellor* the election judge appointed to try the same, such election and return were determined to be null and void; and that the certificate and report made by Mr. Justice *Mellor* as such election judge on the trial of the said petition, and dated the 17th day of July, 1874, rendered the appellant incapable of being registered as a voter, and voting at any election in the United Kingdom during seven years next after the said 17th day of July, 1874.

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The certificate and report so far as the same are material, were stated in the case as follows:—

"Now, I, Sir *John Mellor*, Knight, one of the judges on the rota for the trial of election petitions in England, having according to the Parliamentary Elections Act, 1868, tried the matters alleged in the said petition and determined the same, do hereby certify and report that at the trial of the matters alleged in the said petition, I determined that the said *Albert Grant* was not duly elected and returned at the said election, and that his election and return were and are wholly null and void. And in compliance with the directions of the Parliamentary Elections Act, 1868, I further certify and report that it was proved before me that the said *Albert Grant* was guilty of a corrupt practice at the said election within the true intent and meaning of the Corrupt Practices Prevention Act, 1854.

"And I further report that the nature of such corrupt practice was the promising before and at the time of the said election to certain voters for the said borough of *Kidderminster* and other inhabitants thereof that the said *Albert Grant* would in the event of his being returned at the said election, and after such return, give to such voters and other voters and inhabitants of *Kidderminster* an entertainment consisting among other things of meat and drink with the view and intent to induce such voters to vote for him the said *Albert Grant* at such election.

"And I further report that in course of the trial it appeared more or less clearly that a number of voters had been induced to vote for the said *Albert Grant* by virtue of a promise made to them by persons canvassing them for their votes that their names should be put

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down upon a committee, and that it would be worth to them 10*s.* each when all was over, and in other cases that they would be paid for their services when it could be done with safety, but inasmuch as in some cases the persons implicated were not clearly identified, and in other cases the counsel for the respondent did not call them to contradict or explain the circumstances on the ground that their evidence did not affect Mr. *Grant*, I think that I cannot safely report the names of any persons as having been proved to have been guilty of bribery.

"I am not able from the evidence before me to report that there is reason to believe that corrupt practices extensively prevailed at the said election.

"There was evidence of a good deal of illegal treating during the election, but it was not proved to my satisfaction to have been corrupt."

The evidence produced before the Revising Barrister and admitted by the claimant and objector as common to both consisted of a return to an order of the House of Commons, dated the 12th day of June, 1874, for a copy of the shorthand writer's notes of the judgments delivered by the judges selected in pursuance of the Parliamentary Elections Act, 1868, for the trial of election petitions, and ordered by the House of Commons to be printed on the 5th August, 1874. The case stated that by consent, the Revising Barrister annexed thereto as part thereof a copy of the said return, and for the purposes of the appeal incorporated as facts proved before him the facts stated in Mr. Justice *Mellor's* judgment and certificate.

After hearing all the arguments in support of the said objection and against the said claim, and all the

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arguments in support of the said claim and against the said objection, the Revising Barrister adjourned the further hearing and determination of the said claim and objection until the sitting of the Court to be holden at *Horsham* within such western division of the said county on the 8th day of October, 1877, and at such further hearing he decided and determined, having regard to the distinction existing between bribery and treating, as affecting a voter's mind, and that treating as defined in the Corrupt Practices Act, 1854, does not include a promise to treat, but that bribery as defined in the said Act does include a promise to give, and having regard to Mr. Justice *Mellor's* judgment and certificate and to the nature of the promised entertainment, and the value of the proposed accompanying gifts as set forth in Mr. Justice *Mellor's* judgment, and for other reasons, that the corrupt practice reported by Mr. Justice *Mellor* to the House of Commons to have been committed by the said *Albert Grant* at the *Kidderminster* election was and amounted to bribery within the true intent and meaning of "The Corrupt Practices Prevention Act, 1854," and "The Parliamentary Elections Act, 1868," and was not treating as contended on his behalf, and that consequently it was found by the said report that bribery had been committed by the said *Albert Grant* at the said election, and the Revising Barrister accordingly disallowed his claim to have his name inserted in the list of voters.

Notice was given to the Revising Barrister that the said *Eugene Edward Street* refused to be named respondent, whereupon the Revising Barrister duly nominated the overseers of the parish of *Pagham* to be respondents.

If the Court should be of opinion that the corrupt

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practice found by the said report to have been committed by the said *Albert Grant* at the *Kidderminster* election was and amounted to bribery within the true intent and meaning of the above-mentioned Acts, and that it was found by the said report that bribery had been committed by the said *Albert Grant* at the said election, the decision of the Revising Barrister so far as it disallowed his claim was to be affirmed.

If the Court should be of a contrary opinion, then the decision was to be reversed.

Pollard, for the appellant. The question for decision here is, whether the appellant's case is brought within the 43rd section of the Parliamentary Elections Act, 1868, so as to subject him to the disqualifications imposed by that section. It is a well recognized rule of construction that penal enactments must be strictly construed. In order, therefore, that the disqualifications imposed by sect. 43, may attach, it ought, it is submitted, to be established, in such a way as not to admit of any doubt or discussion, that an offence has been committed, falling within the letter as well as within the spirit of that section. In *Lord Huntingtower* v. *Gardiner* (*a*), *Bayley*, J., said: "Effect must not be given to a penal statute, unless the offence charged comes within the very words of it." And *Best*, J., said: "We are called upon to give effect to a penal clause, and must, therefore, construe it strictly, for we ought not to pronounce a judgment imposing very severe penalties, unless the offence comes within the letter of the Act, whatever might have been the intention of the Legislature in passing it. And in *Britt* v. *Robinson* (*b*), *Willes*, J., said: "When an offence

(*a*) 1 *B. & C.* 299. (*b*) *L. R.* 5 *C. P.* 513.

against the law is alleged, and when the Court has to consider whether that alleged offence falls within the language of a criminal statute, the Court must be satisfied, not only that the spirit of the legislative enactment has been violated, but also that the language used by the Legislature includes the offence in question and makes it criminal." The question here, is not whether, as matter of fact, bribery was committed with the knowledge and consent of the candidate, but whether the learned judge who tried the election petition, has *reported* that bribery was committed with such knowledge and consent. It is not sufficient to bring the case within sec. 43, that the election judge should have found certain facts, from which such an inference might be drawn, if, instead of drawing the inference himself, he has left the responsibility of drawing it to another tribunal. The Legislature has cast the responsibility of reporting that the offence has been committed on the election judge himself; and if he has not so reported, the case is not within the section. This Court has no jurisdiction to try the question whether the facts stated by Mr. Justice *Mellor*, in his report, amount to personal bribery. The Court will not, it is submitted, follow the course which has been adopted by the Revising Barrister in arriving at his decision. The Revising Barrister has not confined himself, as he was bound to do, to the report of the election judge to the House of Commons, which alone could furnish the proper materials for his consideration. Instead of confining himself to the report, he expressly declares that his decision is founded on reasoning and observations which are to be found, not in the report, but in the judgment delivered by the election judge on

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the hearing of the petition. The words of sec. 43, are distinct and precise, that "where it is *found by the report of the judge*, upon an election petition under this Act, that bribery has been committed by or with the knowledge and consent of any candidate at an election, such candidate shall be deemed to have been personally guilty of bribery at such election;" and the section proceeds to incapacitate the candidate during seven years, in the event of such a finding, from being either elected as a member, or registered as a voter. In *Drinkwater* v. *Deakin* (*a*), Lord Coleridge commenting on ss. 43, 45, 46, and 47, said: "It seems to me to result from them all that the disqualifications created by them are intended to be, and are the result of the finding or report of the judge, or other tribunal, and that they attach only on such finding or report, and from its date." The report, it is submitted, in the present case cannot be held with any certainty to be a report that bribery has been committed with the candidate's knowledge and consent. In the first place the word bribery is not used at all, but only the word "corrupt practice." Secondly, it is consistent with the report that the intention of Mr. Justice *Mellor*, was to report the candidate guilty, in accordance with sec. 46, of a corrupt practice, "other than personal bribery within the 43rd section." The argument that the case is not within sec. 43, is much stronger than if the words of the report were simply "guilty of a corrupt practice," the words being "guilty of a corrupt practice *within the true intent and meaning of the Corrupt Practices Prevention Act*, 1854." As the law stood under the Act of 1854, the disqualification which

(*a*) *L. R.* 9 *C. P.* 636.

attached to the candidate was the same, whether the act constituting the corrupt practice was the personal act of the candidate, or the act of his agent without his knowledge or consent. It is submitted that the reasonable inference is, that Mr. Justice *Mellor*, in using the language he does in the report, had in his mind the disqualification arising under sec. 36 of the Act of 1854, attaching equally whether the candidate had or had not personal knowledge of the corrupt practice, and not the more serious disqualifications imposed by sec. 43 of the Act of 1868, which applies only where the candidate is found guilty of personal bribery.

[He also contended that the promise of an entertainment, consisting of meat and drink to be consumed on the spot, did not constitute the offence of bribery, citing *The Bodmin case* (*a*), *The Brecon case* (*b*), *The Poole case* (*c*), and *The Launceston case* (*d*).]

No one appeared for the respondents.

GROVE, J., I am of opinion that the decision of the Revising Barrister should be reversed. I regret that the case has been argued only on one side, as it is no doubt, an advantage to the Court to have all that can be urged on both sides brought fully before it. But upon the materials presented to us, and on the argument of Mr. *Pollard*, I am of opinion that the finding of the learned judge who tried this petition, does not bring the case within that section which alone could disqualify the appellant from being registered as a voter, and from voting at an election—sec. 43 of the Parliamentary Elections Act, 1868.

Under that Act the election judge is required, in

(*a*) 1 *O'M. & H.* 117.
(*b*) 2 *O'M. & H.* 43.
(*c*) 2 *O'M. & H.* 123.
(*d*) 2 *O'M. & H.* 129.

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addition to certifying his determination, whether any person has been duly elected, to report to the Speaker of the House of Commons. He is to report under three heads, contained in sec. 11, sub-sec. 14, with an optional power of adding any special matter which he thinks ought to be brought to the attention of the House of Commons. The first of these heads is: "Whether any corrupt practice has or has not been proved to have been committed *by or with the knowledge and consent of any candidate at such election*, and the nature of such corrupt practice." Similar language is employed in sec. 43, which says: "Where it is found," not by the judgment, but "by the *report* of the judge, upon an election petition under this Act, that bribery has been committed *by or with the knowledge and consent of any candidate at an election*, such candidate shall be deemed to have been *personally* guilty of bribery at such election." Here the learned judge has clearly not reported in the terms of the Statute, that a corrupt practice has been proved to have been committed "with the knowledge and consent" of the candidate. It may be that when he found that the said *Albert Grant* had been guilty of a corrupt practice he had in his mind that he had been personally guilty, but he does not so find. He does not use the words of the Act of Parliament, nor does he use words which necessarily and unambiguously involve such a finding. This is still more apparent when we refer to section 36 of the Corrupt Practices Prevention Act, 1854, which says: "If any candidate at an election for any county, city, or borough shall be declared by any election committee guilty by himself or his agents of bribery, treating, or undue influence at such election,

such candidate shall be incapable of being elected, &c." —language which shows that under that section the term "guilty" of bribery was made applicable to the candidate whether the bribery was committed by the candidate himself or by his agents. The 46th section of the Parliamentary Elections Act, 1868, supports this view still more strongly. It says: "For the purpose of disqualifying in pursuance of the 36th section of the Corrupt Practices Prevention Act, 1854, a member guilty of corrupt practices *other than personal bribery* within the 43rd section of this Act, the report of the judge on the trial of an election petition shall be deemed to be substituted for the declaration of an election committee, and the said section shall be construed as if the words 'reported by a judge on the trial of an election petition' were inserted therein in the place of the words 'declared by an election committee.'" So that the Act by thus speaking of "a member guilty of corrupt practices *other than personal bribery*," has expressly distinguished between a member guilty of a corrupt practice and a member guilty of a corrupt practice by personal bribery. Here the learned judge has found that "the said *Albert Grant* was guilty of a corrupt practice," but he has not added the words "personal bribery," or "with the knowledge and consent of such candidate," and therefore one would *primâ facie* be inclined to take that to mean that the said *Albert Grant* had been guilty of a corrupt practice but not of personal bribery. The words "personal bribery" mentioned in sec. 46, and which, if added here, would have made another offence, do not appear in the report of the learned judge, but only words which being the very words employed in section 46 in contradistinc-

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tion to personal bribery, are not words which of themselves import personal bribery by the candidate, or bribery with the candidate's knowledge and consent.

I am therefore of opinion that upon the face of this report the finding is consistent with the said *Albert Grant* having been guilty of a corrupt practice, but not necessarily by his own personal act or with his knowledge and consent.

Then in the statement of the nature of the corrupt practice there is the same infirmity—the same failure to adopt the words employed in the 14th sub-sec. heading of sec. 11. The words of the report are: "And I further report that the nature of such corrupt practice was the promising," the report does not say by the candidate or with the candidate's knowledge and consent, but it says, "the promising before and at the time of the said election to certain voters of the said borough of *Kidderminster* and other inhabitants thereof," not "that *he* (*a*) the said *Albert Grant* would" but "that the said *Albert Grant* would, in the event of his being returned at the said election, and after such return, give to such voters and other voters and inhabitants of Kidderminster an entertainment." That part of the report therefore does not fix the corrupt practice upon the candidate himself by an absolute and unavoidable implication any more than the former

(*a*) On reference to the return to the order of the House of Commons of 12th June, 1874 (*Accounts and Papers, Session* 1874, No. 374, p. 99), and also to an entry in the *Journals*, vol. 129, p. 315, where the certificate and report of Mr. Justice *Mellor* are set out, it appears that the words of the Report itself are "the promising, &c.." "that *he* the said *Albert Grant* would;" but in the statement in the special case which alone was before the Court, the word "he" is omitted. On inquiry at the Master's office of the Common Pleas Division it has been ascertained that no copy of the return was actually annexed to the case, although the case contained a statement of its being annexed by consent.

part did. In construing a penal enactment we ought to see that what the Act contemplates as the offence is clearly made out to have been committed, and upon the face of this report I think that that does not appear so as to bring the case within the 43rd section of the Parliamentary Elections Act, 1868.

I also think that we ought not to look at the terms of the judgment delivered by the learned judge, but only at the report, and upon two grounds. In the first place, the reasons and observations made in giving judgment are not evidence for the Court. The judge may make remarks in the course of his judgment upon various matters which are not essential to the Act of giving judgment. But, secondly, there is the stronger ground that under sec. 43 of the Parliamentary Elections Act, 1868, the whole disqualification of the candidate is made to depend not upon the judgment delivered by the learned judge, but upon the report of the judgment which he makes under the Act. Here, as I have already pointed out, the report does not find that the candidate was with his own knowledge and consent guilty of a corrupt practice, but is consistent with his having been guilty by his agents and not personally.

It is unnecessary to consider the last point argued by Mr. Pollard, viz., whether, if treating be not an offence under the 43rd section of the Parliamentary Elections Act, 1868, as being distinguished from bribery in the Corrupt Practices Prevention Act, 1854, a promise to treat can nevertheless be such an offence. The argument is obviously a somewhat singular one, assuming treating itself not to be a corrupt practice so as to disqualify under the 43rd section, that a promise to do the thing which in itself is not a corrupt practice

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should nevertheless be a corrupt practice. On that point, however, I express no opinion, it being unnecessary to determine it. My decision proceeds upon the ground already stated, *viz.*, that no report has been made by the learned judge to the House of Commons that bribery has been committed with the knowledge and consent of the candidate.

DENMAN, J. I concur in regretting that this case has been argued only on one side, it being a case of importance, though not perhaps so important as it would have been if we had had to decide all the questions that have been raised.

The short question upon which the case turns is, whether it has been found by the report of the Judge upon this election petition that bribery has been committed by or with the knowledge and consent of the candidate. The Revising Barrister thought that though in terms it was not so found, the report of the Judge did in fact amount to a finding to that effect. For the reasons I shall presently give, I do not agree with him.

The first point which has been raised before us is that no finding of the election Judge will suffice to disqualify the candidate within the meaning of sec. 43, which does not expressly find in terms that bribery has been committed by or with the knowledge and consent of the candidate, so that in this view the mere omission which here occurs of the word "bribery" would of itself be fatal. Now undoubtedly in *Drinkwater* v. *Deakin* (*a*) Lord Chief Justice *Coleridge* in giving judgment drew a very marked distinction between a man being guilty of bribery and the

(*a*) *L. R.* 9 *C. P.* 636.

declaration of his guilt by an election committee, or report of it by a judge on the trial of an election petition, the report being now substituted for the declaration of the election committee; and it might be that the Court might ultimately feel bound to say that unless the Judge in his report finds in express terms that bribery has been committed by or with the knowledge and consent of the candidate, the case is not brought within the 43rd section. Still some very startling results might be suggested as arising from the doctrine thus contended for. The election Judge might in a few words have reported facts which in the judgment of everyone would amount to glaring bribery, and yet if this construction should prevail there would be no disqualification under sec. 43. On this point, however, it is not necessary to our decision to pronounce any opinion, nor do I think it right to do so, having only heard the argument on one side.

I entirely agree with my brother *Grove* that it does not appear with reasonable necessity that the Judge has found bribery to have been committed here by or with the knowledge and consent of the candidate. He has found that the candidate was guilty of a corrupt practice, which he states to have been the promise of an entertainment if he were elected, but many cases might, and several indeed have been suggested, in which those words might be literally complied with without any personal knowledge on the part of the candidate. As to this I concur entirely in the observations of my brother *Grove*, and am prepared to decide the case on this ground. Although it may not be necessary to use the express words of sec. 43, I think there must at the least be something which can

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with reasonable necessity be regarded as equivalent to such a statement. It is therefore unnecessary to consider whether if that which is here stated to have been done was done with the knowledge and consent of the candidate that would constitute a disqualification under sec. 43. No doubt there is something startling in holding that a man is not liable to be disqualified under sec. 43 for actual treating, yet liable for a promise to treat. But, on the other hand, a promise held out to voters on the eve of an election of an entertainment to be carried out for their benefit, or as they might think for their benefit after the election, does look very like bribery, and it may be that it may be no stretch of the words of the enactment to hold it to be bribery. I desire therefore to leave this open for future consideration, and to confine my judgment to the ground on which my brother *Grove* has proceeded, *viz.*: that the words used here do not with reasonable necessity imply knowledge or consent to what was done on the part of the candidate.

LINDLEY, J. I am of the same opinion. To deprive the appellant of his vote, the case must be brought within sec. 43 of the Parliamentary Elections Act, 1868, and the only question to consider is whether it is so or not. There is no actual form of report given in the Act, and there are no actual words, as I apprehend which need be followed in order to bring the case within the section. Still, in the absence of a complete and express finding in terms that bribery has been committed by a candidate, either personally or with his knowledge and consent, when the report itself is

consistent with a contrary view, there is not in my judgment sufficient to disqualify the voter. Here the election judge has not, either in express terms or in equivalent language, found by his report that bribery has been committed with the knowledge and consent of the candidate, and although I think no particular words are necessary, the report must, in order to disqualify, be so clear and precise as to admit of no doubt or difference of opinion as to its meaning or legal effect. Looking at this report, I am by no means satisfied that fairly construed it does amount to anything like a statement of personal bribery as contemplated by sec. 43.

The decision of the Revising Barrister must therefore be reversed.

Decision Reversed.

Solicitors for Appellant—*Robinson & Preston*, agents for *Bostock & Rawlinson*, *Brighton.*

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The residence required by sec. 31 of the the Reform Act (2 Will. 4, c. 45), need not be that of an owner or tenant. Therefore, where during two months of the qualifying period for residence the voter stayed with his wife and child as the guest of his mother-in-law in an almshouse, where they had a separate sleeping-room. Held, notwithstanding the rules of the charity forbad anyone to reside with an inmate without permission from the trustees, and there had been no permission, that the voter nevertheless had a sufficient residence, and that the continuity of his residence was not broken by his absence for a night in London on business.

AT a Court held before the barrister appointed to revise the list of voters for the city and county and borough of the city of *Exeter*, *Brutton John Ford* duly objected to the name of the appellant *James Beal* being retained on the list of persons entitled to vote in the election of members for the borough of *Exeter*, in respect of his freehold house in *Albion Place*, in the parish of *Heavitree*, on the ground that the appellant had not resided for six calendar months next previous to the last day of July, 1877, within the said borough or within seven miles thereof pursuant to 2 *Will.* 4, *c.* 45 (*a*).

The following facts were proved :—

1. The qualification of the appellant was duly proved, and admitted in all other respects.

2. On the 31st of July, 1876, the appellant resided in a house (which he occupied as tenant), situate in *Queen's Road*, in the parish of *St. Thomas-the-Apostle*, within the said borough, where he continued to reside until the 29th of March, 1877.

3. On the said 29th March, the appellant's term

(*a*) The case, as originally stated referred to sec. 27 of the above Act, but the Revising Barrister in a supplementary statement, certified that the claim of the appellant was as a freeholder, and that the statement in the case that the appeal was founded on sec. 27 was erroneous, and that the reference ought simply to have been to the statute or to the 33rd section of it. On the hearing of the argument the section cited as applicable, and on which the Court gave judgment was not sec. 33, but sec. 31 ; but the language of the proviso appears to be similar in the two sections, so far as relates to what constitutes the fact of "residence."

having expired, he gave up possession of his residence in *Queen's Road*, and he, his wife and child, of necessity went to his wife's mother's house (at her invitation), with the intention of remaining there, if he was so permitted, until he could obtain a suitable dwelling-house within the said borough.

4. The mother-in-law of the appellant resides at No. 5, *Mount Durham*, within the said borough. The house so occupied by her is one of a number of houses, called "The Free Cottages," which were given by the trustees of the same to inhabitants of *Exeter*, to be occupied free of rent during the pleasure of the trustees.

The following are the printed rules of the "Free Cottages:"—

RULES CONTAINED IN THE TRUST DEED.

Except in the case of a married couple, no person shall reside with any inmate, except by permission of the trustees.

Every inmate, by whomsoever nominated, shall be subject to the rules and orders of the trustees, and shall be subject to dismissal by the trustees, as hereinafter mentioned.

The trustees shall from time to time have full power and authority to remove and displace any person from the cottages who shall wilfully transgress such rules or orders, or be guilty of other misconduct.

BYE-LAWS AND REGULATIONS.

1. No inmate shall receive parochial relief without the special consent of the trustees; and every inmate shall be considered as occupying during the pleasure of the trustees.

2. Any inmate marrying shall, within one week, give notice thereof to the trustees, who will be at liberty to regard such marriage as a forfeiture of the cottage; and the like regulation shall apply to the withdrawal of the guaranteed allowance to any inmate, or any material alteration in his or her circumstances.

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3. The inmates are required to keep themselves and their houses always perfectly clean and neat, and to conduct themselves in a quiet, sober, and orderly manner. Quarrelling is strictly forbidden; and for the maintenance of charity and good feeling they are enjoined not to interfere with each other's affairs.

4. No inmate will be allowed to carry on any handicraft trade in the cottages.

5. No inmate will be allowed to be absent from his or her dwelling more than a month at any one time without the consent of the trustees.

6. If any damage be done to the roof of any cottage or otherwise, the inmate shall report the same immediately to the clerk.

7. Each cottage will be visited at least once in every quarter by the clerk, who will report to the trustees at their general meetings as to the observance of the foregoing regulations.

5. From the 29th March to the 29th May, 1877, the appellant (with the exception of one night, the night of the 2nd of April, 1877, when absent in London on business) continuously lived and slept in the house so occupied by his mother-in-law. The appellant's wife and child lived and slept in the said house of the appellant's mother-in-law every day and night throughout the whole period, from the said 29th of March to the 29th of May, during the whole of which time the appellant, his wife and child, exclusively occupied one sleeping apartment in the said house, but lived during the day in certain other rooms in the said house, and occupied them in common with the appellant's mother-in-law, and during this period had no other residence or dwelling within the said borough, or in any other place. The appellant's mother-in-law had not obtained any permission from the trustees, as required by rule 1, to have her son-in-law to reside with her.

6. The appellant did not pay his mother-in-law for such use and occupation, but lived there as her guest, without interference or interruption on the part of the trustees, until the said 29th of May, when he went to reside in the house in which he is now residing, which house is also within the said borough.

7. The appellant is a clerk to a solicitor carrying on business in the city of *Exeter*.

On behalf of the objector, it was urged that from the 29th of March to the 29th of May, the voter had no residence within the borough or within seven miles thereof, first, because the room which he used at his mother-in-law's house was used by him as her guest or visitor; secondly, because the house in which he resided for this time being an almshouse, the occupier had no right, by the rules of the "Free Cottages," to give him the separate and entire use and occupation of any room in the said house. The case of *Ford* v. *Pye* (*a*), was relied on.

On behalf of the voter, it was urged that during the whole of the six months previously to the 31st of July, 1877, he actually resided within the said borough; that the residence at his mother-in-law's was *bonâ fide*, and that he went there with the intention of remaining there until he could find another suitable dwelling, and did remain there until that object was accomplished; that he had had the separate and entire use and occupation of a sleeping apartment in the house of his mother-in-law without interruption on the part of the trustees during the time he resided there; that he was a tenant at will of the said room of his mother-in-law;

(*a*) *Ante*, 157; *S. C. L. R.* 9 *C. P.* 269.

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that in the case of a freehold qualification, all that was required was that the voter should actually and bodily reside within the borough or seven miles thereof; that the words of the statute "shall have resided," should be read as "shall have lived or have had a residence or dwelling;" and that the case of *Ford* v. *Pye* (*a*), did not apply.

The Revising Barrister decided that the residence required by the Act is that of a *bonâ fide* inhabitant, having a *domus* of his own within the distance therein set out; that the appellant between the 29th of March and the 29th of May, 1877, was a trespasser *ab initio*, or at most a visitor in the house of his mother-in-law; and that the six months' residence was thereby interrupted. He therefore expunged his name from the said list.

The question for the opinion of the Court was whether, consistently with the above facts, the Revising Barrister could legally find that the appellant had not resided for the six calendar months next previous to the last day of July, 1877, within the said borough.

Charles, Q.C. (*Bucknill* with him), for the appellant. The question for decision here is as to the "residence" required under sec. 31 of 2 *Will.* 4, *c.* 45. The appellant has admittedly, in all other respects, a good qualification as a freeholder, but it is contended for the respondent, and the Revising Barrister has held, that the condition contained in that section as to "residence" for the six months before the 31st July has not been complied with. Does then that enactment require any special description of residence? In terms

(*a*) *Ante*, 157; *S. C. L. R.* 9 *C. P.* 269.

it certainly does not. The language is perfectly general. It simply requires "residence" for the prescribed period without imposing any condition as to the nature of it. The requirement differs from that which is contained in sec. 27 of the same Act, and in sec. 3 of 30 & 31 *Vict.* *c.* 102, in regard to occupation. "Occupation," under those sections is expressly required to be "as owner or tenant," but no such restriction is imposed by sec. 31 as to residence. Before the Reform Act, residence was not a condition of the exercise of the franchise by freeholders in those boroughs where they had the right to vote. Surely then under that statute the fact of residence must be sufficient, whatever the nature of the residence. The question of residence or non-residence within a prescribed area cannot depend on whether or not the residence be lawful. The mere fact of living within the prescribed area for the requisite period would, it is submitted, be sufficient, though it is not necessary to press the argument to that extent here, since the facts show that the appellant had a definite place of residence, where he and his family lived throughout the entire period. *Rex* v. *Souton* (*a*), may be referred to on the interpretation which has been put upon the cognate word "inhabitancy," in cases decided under the law of settlement. *Lee*, C. J., there said: "Upon the old law, when a man came to a place, on the first day he was regarded as a stranger; on the second day as a guest; and on the third, as an inhabitant."

Bompas, Q. C., for the respondent. The Revising Barrister has found in substance that the appellant did

(*a*) *Andr.* 345.

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not reside continuously within the prescribed area for the period required by the statute, and the question is whether on the facts before him, he could legally so find. Unless the mere fact of being physically within the prescribed area necessarily constitutes "residence" within it, the question of "residence" was one of fact for the Revising Barrister to determine. To constitute a residence under this enactment, it is submitted that it is essential that the person claiming to be resident should have a fixed home where he resides. In *Whithorn* v. *Thomas* (*a*), *Erle*, J., said: "I think that in the Reform Act the intention of the legislature was, that a party who obtained a vote by residing in a borough should have some local interest there, referring to the ordinary meaning of the word *residence* as conveying the idea of a home." It is not indeed contended that in order to qualify himself it was incumbent on the appellant to have a home of which he was the master, but any continuous *home* within the locality would, it is admitted, suffice to give the interest which the statute requires. But to ascertain whether the Revising Barrister was wrong in point of law in his decision, we must look to the facts which he has found, remembering that on any question of fact his decision is final. Can it be held as matter of law that he was necessarily wrong in his conclusion, that the almshouse occupied by the appellant's mother-in-law by permission of the trustees of the charity, was not the appellant's home, more especially when by the rules of the charity the appellant was a mere trespasser in living there? Supposing, however, that the almshouse must, on the facts

(*a*) 7 *M. & G.* 10; *S. C.* 1 *Lutw.* 134.

found, necessarily be regarded as the appellant's home so long as he was actually within the limits of the borough, it is submitted that a residence of that character could only continue while he was physically there, and that when he went away to *London*, though only for a night, he could not be deemed to have a constructive residence. On this point the definition of residence in *Elliott on Qualifications and Registrations*, 2nd edition, p. 204, adopted by this Court in *Powell* v. *Guest* (*a*), and *Ford* v. *Pye* (*b*), is material. "Absence," it is there stated, "no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence." It could not be said that within that definition, the appellant, when he went away to *London*, had liberty to return at any time to the almshouse in *Exeter*. He could not lawfully return there without the permission of the trustees, and under such circumstances the Court will not, it is submitted, hold that he had still a constructive legal residence in the borough, while in fact he was absent.

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DENMAN, J. I am of opinion that the decision of the Revising Barrister must be reversed. The ground of his opinion he states to be that "the residence required by the Act is that of a *bonâ fide* inhabitant having a *domus* of his own within the distance therein set out." His subsequent statement that the appellant was a trespasser is of no importance to the question

(*a*) *Hopw. & Ph.* 155; *S. C.* 18 *C. B. N. S.* 80.

(*b*) *Ante*, p. 165; *S. C. L. R.* 9 *C. P.* 272.

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on which his decision turned. The question for our decision arises under sec. 31 of 2 *Will.* 4, *c.* 45. That section preserves to freeholders in certain boroughs, which are counties in themselves, the right to vote, subject to their having "resided" for six calendar months next previous to the last day of July within the limits therein prescribed. The question, therefore, is what "reside" means in that section, and this we cannot determine by reference to the construction which has been put upon the word in other statutes dealing with different subject-matters. We know that before the Reform Act enormous expense was often incurred in bringing up freeholders from long distances to take part in the elections of certain boroughs, though frequently these freeholders had no knowledge of the locality for which they voted, and were brought up at great expense to the candidate, and to the disappointment of those to whom the locality was known, and who were interested in it. I think it was for that reason more than any other that the Legislature thought fit to interfere and impose the condition of residence—not, indeed, intending to impose so strict a restriction as Mr. *Bompas* has contended for, but that the voter should be one who had not ceased to know the place, and to dwell there so as in fair construction to be considered resident.

Here I think the respondent was a resident within the borough. He was dwelling in a house in *Exeter* with his wife and child. It is said that for about two months of the period his tenure was precarious, as he might have been turned out at any time. But that, I think, does not affect the question. Then it was said that, if a residence of so slender a character be suffi-

cient, it must, at all events, be continuous, and that absence for a single day will break the continuity. That argument appears to me a fallacy. Looking to the reason of the thing, as well as to its substance, I cannot think that the appellant was the less resident in *Exeter* because during the period of residence he was for one night absent in *London* on business.

LINDLEY, J. I am of the same opinion. The question turns on the meaning of the word "reside" in sec. 31 of the Reform Act, and it can only arise as to the period between the 29th March and the 29th May, for during the remainder of the period the appellant had a home of his own within the borough. Now, in point of fact, between the 29th March and the 29th May the appellant was living in a house within the borough, which was occupied by his mother-in-law, where he and his family had a temporary home. I am not, indeed, prepared, nor is it necessary, to go the full length of Mr. *Charles'* contention that a mere wanderer would have a sufficient residence if he kept within the prescribed limits. But here the only conceivable answer to the fact of residence is that during the two months that the appellant resided with his mother-in-law he was liable to be turned out by the trustees. I think that that circumstance does not alter the fact of residence.

Decision Reversed.

Solicitor for Appellant—*S. D. Hamilton*,
for
J. W. Friend, Exeter.

Solicitors for Respondent—*J. E. Fox & Co.*,
for
H. & B. T. Ford, Exeter.

BALLARD, Appellant; ROBINS, Respondent.

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Among the county voters on the register for a parish, A's name appeared under the heading "voters in respect of property including occupiers at a rent of 50*l.* and upwards," but his qualification was stated in the 3rd column as "occupier of house and land rated at 12*l.* and upwards." A had no qualification entitling him to be entered where his name appeared, but he had the qualification set out in the 3rd column. Held that there was a mistake in the list within 6 Vict. c. 18, s. 40, which the Revising Barrister had power to amend and ought to have amended, by transferring A's name to the 12*l.* list.

AT a Court held by one of the Barristers appointed to revise the list of Voters for the County of *Southampton*, on the register of Voters for the Parish of *Lyndhurst* in the *Tatton* Polling District for the County of *Southampton* under the heading "Voters in respect of Property, including occupiers at a rent of 50*l.* and upwards," the name of *John Ballard* the appellant appeared in its alphabetical order.

In the third column, under the heading "nature of qualification," was inserted "occupier of house and land rated at 12*l.* and upwards."

Notice of objection was given to the name of the appellant being retained on the list, the objection being to the third column and to the nature of his qualification. There were twelve other persons whose names appeared in this list in a similar manner and with a qualification similar to that of the appellant, and of these six had been objected to.

It was admitted that the appellant had not in fact, such a qualification as to entitle him to be upon this list but he had the qualification set out in the third column.

There was an alphabetical list of persons entitled to vote "in respect of the occupation as owner or tenant of lands or tenements of the rateable value of 12*l.* or upwards."

In this list the names of the appellant, and the other twelve persons mentioned above, did not appear, nor

did he or they send notice of claim to be placed thereon before the 25th of August, as provided by 31 & 32 *Vict. c.* 58, *s.* 17.

It was contended that the appellant possessing a qualification which would entitle him to vote it was a mistake his name appearing in the first mentioned list instead of in the 12*l.* occupiers' list, and that under 6 *Vict. c.* 18, *s.* 40 this might be corrected by the Revising Barrister by striking the name of the appellant out of the list in which it appeared and inserting it in the 12*l.* occupiers' list. The Revising Barrister was of opinion that he had no power to do this, and he struck out the names of the appellant and the six other persons objected to and refused to insert them on the 12*l.* occupiers' list.

If the Revising Barrister's decision was wrong the names of the appellant and the six other persons objected to were to be inserted in the list of persons "entitled in respect of the occupation as owner or tenant of lands or tenements of the rateable value of 12*l.* or upwards."

Ridley for the appellant. The question raised by the Revising Barrister is whether he had the *power* to amend. It is therefore to be concluded that he would have amended, if he had thought he had the power. It is submitted that under sec. 40 of 6 *Vict. c.* 18, he had ample power of amendment. That section enacts "that the Revising Barrister shall correct any mistake which shall be proved to him to have been made in any list." Here the qualification of the appellant was correctly stated in the list, and the only defect consisted in the

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name appearing by mistake under a wrong heading. The mistake was a mistake in a "list" within 6 *Vict.* *c.* 18, *s.* 40. A perusal of the material sections of that Act will show that the list there spoken of must mean the entire list which the Revising Barrister is called upon to revise for each particular parish. As the law stood under 6 *Vict.* *c.* 18, this "list" consisted of the list of claimants, and a copy of that part of the register relating to the particular parish, which is directed to be sent by the Clerk of the Peace to the overseers, and on which they have to make their marginal additions. These two component parts of the list were by sec. 6 to "be deemed the *list of voters* for such parish." The same phrase occurs again in sec. 32, where the duty is imposed on the Clerk of the Peace of requiring the attendance of the overseers at the Court "for the revision of the *list of voters* relating to their said parish;" and in secs. 36 and 37 similar language is again employed. Under sec. 6 of the Representation of the People Act, 1867 (30 & 31 *Vict.* *c.* 102), a new class of voters was for the first time introduced into counties by the creation of the rating occupation franchise. The machinery for making out a list of that portion of the voters is supplied by sec. 30 of the same Act, which imposes on the overseers in counties a similar duty to that which had been previously imposed on the overseers in parliamentary boroughs under 6 *Vict.* *c.* 18. But a reference to sec. 19 of 31 & 32 *Vict.* *c.* 58, shows that the list made out by the overseers of this new class of county voters forms a part of the entire list for the whole parish. Sec. 19 does indeed provide that the names of this new class of voters—

occupiers at 12*l.* rateable value or upwards—shall appear "in a separate list" after the list of voters in such parish otherwise qualified; but it further enacts that "such separate list shall be deemed to be part of the lists of county voters of such parish." The effect of that section is, it is submitted, to make one entire list of county voters for the whole parish, but with a separate alphabetical arrangement of the two sets of voters for the purpose merely of a more convenient classification of them. Sec. 59 of 30 & 31 *Vict. c.* 102, and sec. 2 of 31 & 32 *Vict. c.* 58, provide that those two Acts respectively are to be construed as one with the 6 *Vict. c.* 18. Consequently the provisions of 6 *Vict. c.* 18, *s.* 40, which were applicable to the "list of voters," as it existed when that Act passed, must now apply to the list of voters as enlarged by the subsequent Acts, including among the rest the 12*l.* occupiers. Convenience is in favour of the construction contended for, and it is also, it is submitted, in strict accordance with the language of the enactments.

Hooper for the respondent. The Revising Barrister rightly held that under 6 *Vict. c.* 18, he had no power to amend. The case is not within the scope of the 40th section. The amendment of a mistake in a list was never intended to include so great an alteration as is involved in striking out from one list an indefinite number of names, and then inserting them in another list of a wholly different character, and for preparing which the machinery is different. The register formed under 6 *Vict. c.* 18, is of a permanent character, and the duties of the overseers in respect to it are minis-

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terial. The 12*l.* list on the other hand is made out afresh in each year by the overseers, and in preparing it, it is their duty to exercise a discretion as to the names which they insert. The legislature, by enacting, in sec. 19 of 31 & 32 *Vict. c.* 102, that the 12*l.* occupiers shall appear in a separate list, evidently intended that this class of voters should be kept distinct from those on the permanent list. A person desirous to object to the appellant's title to be on the 12*l.* list would in the present case have been misled. Not finding the name on the 12*l.* list, he would have gone away satisfied. Whether any objector was in fact misled is not stated, but it is submitted that it is enough to show that he might have been reasonably. In *Mather* v. *The Overseers of Annandale* (*a*) the Court were of opinion that under the circumstances of that case, the erroneous heading was not misleading. If they had thought that it was misleading, the decision would have been different. A serious impediment would be created to the practical work of revision if, as contended on the other side, the overseers could mix up all the names on one list, and leave the burden of sorting and arranging them under their appropriate headings to be performed by the Revising Barrister.

[He also referred to *Bennett* v. *Brumfitt* (*b*).]

Ridley was not heard in reply.

DENMAN, J. The objection in this case turns mainly on sec. 40 of the 6 *Vict. c.* 18, which enacts that the

(*a*) 1 *Hopw. & Colt.* 461; *S. C. L. R.* 6 *C. P.* 272.

(*b*) 1 *Hopw & Colt.* 80; *S. C. L. R.* 4 *C. P.* 407.

Revising Barrister shall correct any mistake which shall be proved to him to have been made in any list, but provides that "whether any person shall be objected to or not no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be, nor shall the Barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." Here the appellant's name appeared on the register under a heading, "voters in respect of property, including occupiers at a rent of 50*l.* and upwards," but his real title was as an occupier "rated at 12*l.* and upwards," and under these circumstances it was objected that his name appeared in the wrong place. The question for our decision is whether the Revising Barrister was bound to hold that the appellant's right to vote was gone, because sec. 19 of 31 & 32 *Vict. c.* 58, provides that the names of the 12*l.* occupiers "shall appear in a separate list." In my judgment this objection is really a play upon words. Although by sec. 19 the names of the 12*l.* occupiers are to appear in a separate list, there is nothing to show that that list must be to all intents separate in this sense, that it is not to form part of the list of voters for the particular parish. If that were its effect, it would be conferring on the overseers a function which would be unjust in its operation, as it would enable them to disqualify a voter by the mere act of placing his name on a wrong list. I think there is no necessity so to construe the enactment. The natural interpretation of sec. 40 of the Registration Act is that it empowers the Revising Barrister to correct any mistake in the list,

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into however many portions the list may be subdivided; and although a subsequent enactment splits the list in two parts for the purpose of convenience, there is nothing to show that if the qualification be fairly described, though in the wrong place in the list, the Revising Barrister is nevertheless tied down by that enactment, and necessarily bound to disqualify the voter.

The objection was solely on the ground that the Revising Barrister had no *power* to amend, without reference to any other consideration, and I am of opinion that the Revising Barrister took too limited a view of his power.

LINDLEY, J. I am of the same opinion. I think that the power of amendment in sec. 40 of the Registration Act applies not merely to the list of 12*l.* occupiers, but to that list as forming part of the thing which comes before the Barrister for revision, for it is to that his power of amendment is applicable. Here we have one list of "voters in respect of property, including occupiers at a rent of 50*l.* and upwards," and another list of persons entitled to vote as occupiers, at a rateable value of 50*l.*, or upwards; and it is no doubt the duty of the overseers to keep these two lists separate. But the very object of giving the power of amendment to the Revising Barrister is to enable him to correct mistakes of this description. Then it is said that the power of amendment is limited to the correction of mistakes that are not calculated to mislead, and that this was calculated to mislead. But here any person who looks at the list in order to find the appellant's name, will find both his name and qualification correctly described,

and is in a position to object to him. The means exist of rectifying the mistake, and looking to the powers of amendment, I think it no sufficient answer to suggest the mere possibility of someone having been misled. The Revising Barrister would himself have amended if he had not thought that his power to amend was restricted.

Decision reversed.

Solicitors—For Appellant, *T. E. Coxwell,*

for

W. Coxwell, Liverpool.

For Respondent, *Bradby, Robins & Son.*

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

UNDER THE STAT. 6 VICT. c. 18,

IN

MICHAELMAS TERM, 1878.

IN THE

FORTY-SECOND YEAR OF QUEEN VICTORIA.

BARTON, Appellant; TOWN CLERK of BIRMINGHAM, Respondent.

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Nov. 19.

The operation of section 19 of "The Poor Rate Assessment and Collection Act, 1869," (32 & 33 Vict. c. 41) is not restricted to cases where the overseers have agreed in writing with an owner to receive the rates from him under section 3, or where the vestry has ordered the rating of owners instead of occupiers under section 4, but applies wherever an agreement within section 7 has been entered into between an owner and an occupier for payment of the rates by the owner.

Therefore where A, the occupier of a counting house of a value above the limit to which sections 3 and 4 of the said Act are applicable, and sufficient to qualify under the Reform Act (2 Will. 4, c. 45), had agreed with the owner of the whole house of which the counting-house formed part that the owner should pay the rates, and the owner had accordingly been rated and had paid the rates for the whole house: Held that, although the overseers had omitted A from the rate-book, and he had not claimed to be rated, his franchise was preserved by section 19.

Smith* v. *Overseers of Seghill (*a*) **followed, *Cross* v. *Alsop*** (*b*) **distinguished.**

AT a Court held for the revision of the list of voters for the borough of *Birmingham* the respondent duly objected to the name of *Bernard Batigan Hackney* being inserted in the list of voters.

(*a*) *L. R.* 10 *Q. B.* 422.
(*b*) 1 *Hopw. & Colt.*, 444; *S. C. L. R.*, 6 *C. P.* 315.

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sonally rated to the poor rate. The rating of his landlord will not suffice to qualify him. Here the claimant has not been rated. His landlord has for the whole house of which the claimant's counting-house forms a part. The personal rating of the voter has always been regarded under the Reform Act as absolutely essential to the franchise. Even before the Reform Act various local Acts had been passed in different boroughs for the purpose of rating owners instead of occupiers in certain cases of small tenements. The object contemplated by those enactments was simply to facilitate the collection of the poor rate. Notwithstanding the existence of those enactments, however, of which the Legislature must be presumed to have been cognizant, the Reform Act provides in the most distinct manner for the rating of the occupier as an essential condition of his acquisition of the franchise. The only relief given in cases of omission was under section 30, which required the overseers to insert the occupier's name in the rate, upon his claiming to be rated, and tendering the amount of the rates, in which case, even though the overseers failed to insert him, his franchise was preserved. Coming to "The Representation of the People Act, 1867," we find the provisions for rating as an element of qualification equally stringent as in the Reform Act. Moreover, as under the Act of 1867, value was not made essential to the householders' franchise, the liability of the occupier of a small tenement to be disfranchised by his landlord being rated instead of himself would, if no provision had been made to meet it, have become under that Act a question of much wider importance than under the Reform Act. In some boroughs this danger of disfranchisement arose from the Small Tenements Act

(13 & 14 *Vict.* c. 99) having been put in force, in others from local Acts having been passed regulating the rating of small tenements. As matter of history we know that section 7 of "The Representation of the People Act, 1867," was expressly passed to obviate this danger; and the mode in which it sought to effect it was by sweeping away the power of rating owners instead of occupiers in every case, with the single exception provided for by that section—an exception which has no doubt given rise to considerable difficulties in the attempt to construe it. *Stamper* v. *The Overseers of Sunderland* (*a*).

The question, however, now for decision arises under the 32 & 33 *Vict.* c. 41. It will be contended on the other side, that that Act has by its 19th section entirely done away with the necessity for the rating of the occupier as an element in his qualification, not merely in the limited class of cases with which that Act deals, but in every case whatever. That an Act of Parliament, passed as this Act was, as its title and preamble show, with a view merely to rating purposes, and the collection of the poor rate, and of which the principal object was to legislate as to the rating of small tenements, should by a sidewind have effected so fundamental an alteration in election law is, to say the least of it, remarkable. But in *Cross* v. *Alsop* (*b*) this Court, the final Court of Appeal in registration cases, decided that it had no such operation. It will be observed that, by the 6th section of the Act, the Small Tenements Act (13 & 14 *Vict.* c. 99) and so much of any local Act as relates to the rating of owners instead of occupiers to the poor rate are expressly repealed. Inconvenience was felt in many places owing to the

(*a*) *L. R.* 3 *C. P.* 388.

(*b*) 1 *Hopw. & Colt.* 444; *S. C. L. R.* 6 *C. P.* 315.

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sweeping character of the provisions in section 7 of the Representation of the People Act, 1867, which in abolishing the compound householder had seriously affected the law of rating and the collection of rates throughout the country in regard to small tenements. It was sought by 32 & 33 *Vict.* c. 41 to remedy this inconvenience. The object in view was to provide new machinery in regard to small tenements for rating the owners instead of the occupiers, and collecting the poor rates from the owners; and at the same time to protect the franchise of those who were the occupiers of such tenements. The machinery for that purpose is provided by sections 3, 4, 7, and 19. Section 3 enables the owner of any rateable hereditament below a certain value, by agreeing in writing with the overseers to become liable to them for the poor rates in respect of it, whether occupied or not, to obtain an abatement of rate not exceeding 25 per cent. Section 4, which is confined to the same class of hereditaments as section 3, authorizes the compulsory rating of the owners of such hereditaments instead of the occupiers at an abatement; with a further abatement, upon an agreement being come to as to all hereditaments, whether occupied or not. Section 7 gives the same effect to the payment of the reduced rate by the owner, as if the occupier had himself paid the full rate. Section 19, on which the present question turns, enacts that "the overseers in making out the poor rate shall in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupier's column of the rate book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for

any qualification or franchise as aforesaid." The section then imposes a penalty on any overseer for "negligently or wilfully and without reasonable cause" omitting any occupier's name, or for the misstatement of any name, and provides "that any occupier whose name has been omitted shall, notwithstanding such omission and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted." In *Cross* v. *Alsop* (*a*) the unanimous opinion of this Court was that section 19 was not of general application; but that it applied only where the overseers had agreed in writing with an owner to receive the rates from him under section 3, or where there had been an order of vestry for rating owners instead of occupiers under section 4. The observations of *Willes*, J., in giving judgment are especially in point to shew that the Legislature could never have intended by a side-wind to repeal *in toto* the requirements of rating as an element of qualification, but must have meant merely to provide against the danger to which the occupier's franchise would have been exposed from the provisions of sections 3 and 4 being carried out, if no relief had been given under the 19th section. It is true that in *Smith* v. *The Overseers of Seghill* (*b*) the Court of Queen's Bench came to a contrary conclusion as to the construction of section 19; but this Court being the final Court of Appeal in Registration Cases, and having the exclusive cognizance of such Appeals, will not, it is submitted, overrule its previous decision, at all events unless convinced that it was clearly wrong.

(*a*) 1 *Hopw. & Colt.* 444; *S. C. L. R.* 6 *C. P.* 315.
(*b*) *L. R.* 10 *Q. B.* 422.

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Mellor, Q.C. (*Dugdale* with him) for the respondent. The case of *Cross* v. *Alsop* (*a*) is distinguishable; though, if it were not, it would still be open to this Court to review its previous decision, if satisfied that it was wrong. *Webster* v. *The Overseers of Ashton-under-Lyne* (*Hadfield's case*) (*b*). The operation of the 32 & 33 *Vict.*, c. 41, is not limited, as contended on the other side, to carrying out the provisions of ss. 3 and 4. In *Smith* v. *The Overseers of Seghill* (*c*), *Lush*, J., points out that there are provisions in the Act which must necessarily have a wider operation than those sections; and he refers more especially to ss. 1 and 7, though those are not the only sections to which the remark applies. Sect. 1 clearly embraces cases not falling within ss. 3 and 4, since ss. 3 and 4 are limited in their operation to hereditaments below a certain value, whereas under sec. 1 there is no restriction imposed on the value of the hereditament. Sect. 7, applies not only to all cases within ss. 1, 3, and 4, but to every case where an agreement has been entered into between the owner and occupier for payment of the rates by the owner. Ss. 17 and 18 must both of them, from their nature, be of general application. Then as to the language of sec. 19. The direction that "the overseers in making out the poor rate shall *in every case* enter in the occupier's column of the rate-book the name of the occupier," seems as comprehensive as language can make it. Moreover in *Smith* v. *The Overseers of Seghill* (*c*), the construction of sec. 19 being there necessary to the decision, the Court of Queen's Bench

(*a*) 1 *Hopw. & Colt.* 444; *S. C.*, *L. R.* 6 *C. P.*, 315.
(*b*) *Ante*, p. 89; *S. C. L. R.* 8 *C. P.* 281.
(*c*) *L. R.* 10 *Q. B.* 422.

unanimously decided that that section was applicable to every case in which the name of the occupier was omitted from the rate-book. In *Cross* v. *Alsop* (*a*), on the other hand, the construction of sec. 19 was not necessary to the decision; and the Judges of the Queen's Bench expressly distinguished *Cross* v. *Alsop* (*a*), on the ground that the occupier there was not separately rated, as he ought to have been to entitle him to vote under "The Representation of the People Act, 1867," for part of a house, but jointly rated with others; and that the proviso in sec. 19 did not cure that state of things, as it only applied where the occupier had been *omitted* from the rate-book. Again, from the statements in the present case, the Court will, it is presumed, deem it a necessary inference that there was an agreement between the owner and the occupier that the owner should pay the rates. If so, the owner had become "liable to the payment of the rate instead of the occupier" within the meaning of the 19th section, and it becomes unnecessary to consider whether sec. 19 applies also to cases where the owner has not become liable.

[He was stopped by the Court.]

Jelf in reply. If the owner was liable here to be rated, that can only be because he was the occupier of the premises, as well as the owner.

[Lord COLERIDGE, C.J. If the owner "has agreed with the occupier" to pay the rate, so as to bring the case within sec. 7, has he not become "*liable* to the payment of the rate within sec. 19"?]

(*a*) 1 *Hopw. & Colt.*, 444; *S. C. L. R.* 6 *C. P.* 315.

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Sec. 19 points, it is submitted, to a public liability—a liability to the overseers as representatives of the parish, not to a liability founded on mere private agreement.

[Lord COLERIDGE, C.J. The word "liable" also occurs in sec. 8. "Where an owner who has undertaken, whether by *agreement with the occupier*, or with the overseers, to pay the poor rate, or *has otherwise become liable* to pay the same.]

[GROVE, J. Do you contend that the word "liable" has one meaning in section 8, and another in section 19?]

The liability to the parish would be enforceable by distress; whereas that founded on private agreement would not (*a*). The 19th section points, it is submitted, to a liability enforceable by distress.

In reference to *Cross* v. *Alsop* (*b*) it has been argued on the other side, that the opinion so strongly expressed by all the members of the Court, that the operation of section 19 must be restricted to cases arising either under section 3 or section 4 was not necessary to the decision. But that, it is submitted, is not so. If the Court of Common Pleas, when deciding that case, had been of opinion that the 19th section was of general application they would have upheld the vote. There is, at all events, nothing in the report of the case from which the Court can say, affirmatively, that they would not. It is true that in that case the claimant of the

(*a*) But see as to this, sec. 11.
(*b*) 1 *Hopw. & Colt.* 444; *S. C. L. R.* 6 *C. P.* 315.

vote was not separately rated; but if section 19 be general, as the other side contend, the case would have fallen within the first branch of the section; and, the claimant would have been "deemed to be duly rated for any qualification or franchise as aforesaid" within its express words; so that the difficulty of there having been no separate rating would thus, it is submitted, have been surmounted. The Court who decided *Cross* v. *Alsop* (*a*), must surely be taken to have decided it on the grounds which they themselves allege, and not on some hypothetical ground which, if it can be suggested at all, is at all events not the ground on which the Court gave their judgments.

Lord COLERIDGE. I am of opinion that the decision of the Revising Barrister must be affirmed. In so deciding, I am aware that we may, at first sight, seem to be in conflict with *Cross* v. *Alsop* (*a*); but, for reasons which I will presently give, I think it will be found that we are not overruling or even differing from that case, or in any substantial way from the *obiter dicta* therein.

Now, we must take it that there was here an agreement between the owner and occupier that the owner should pay the rates; for, although the Revising Barrister has not found that to be so in express terms, he has found facts from which it must clearly be inferred. The rent paid "was more than it otherwise would have been in consideration of the landlord paying the rates," so that virtually the respondent has paid the rates in the shape of rent. The sections of 32 & 33 *Vict.* c. 41 which are material are sections 3, 4, 7, 8, and 19. Section 7

(*a*) 1 *Hopw. & Colt.*, 444; *S. C. L. R.*, 6 *C. P.*, 315.

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enacts that "every payment of a rate by the owner, whether he is himself rated instead of the occupier," referring to a rating by order of the vestry under section 4, or "has agreed with the overseers to pay such rate," referring to an agreement with overseers under section 3, or "*with the occupier*" (which is a third case), "shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which, as regards rating, depends upon the payment of the poor rate." Section 8 enacts that "where an *owner* who has undertaken, whether by *agreement with the occupier* or with the overseers to pay the poor rates, *or* has *otherwise become liable* to pay the same, omits or neglects to pay any such rate, the occupier may pay the same and deduct the amount from the rent." Then sect. 19, which imposes on the overseers certain duties the neglect of which it visits with a penalty, enacts that "the overseers, in making out the poor rate, shall, in every case, whether the rate is collected from the owner or occupier, or *the owner is liable to the payment of the rate instead of the occupier*, enter in the occupier's column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid." Now, how is the owner *liable?* Three ways are, as I have shewn, pointed out by the 7th and 8th sections, viz., order of vestry, agreement with the overseers, and agreement with the occupier; and the word "liable" is expressly used in section 8 as applicable to each of these three ways. On what principle, then, can it be contended that, when in sections 7 and 8 three ways are pointed out in which this liability can be created, we are to restrict the meaning of the word "liable" in section 19 to two of the

three, excluding the third? I confess that I am unable to accede to that reasoning. The section further provides "that any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted." If the present case falls within the first branch of the 19th section, as I think it clearly does, it must also fall within this proviso, which preserves the respondent's franchise, notwithstanding the overseers' omission.

It is said, however, that this decision will conflict with *Cross* v. *Alsop* (*a*); and, at first sight, it certainly does conflict with some expressions in the judgments. But, in the first place, the facts in *Cross* v. *Alsop* (*a*) were not the same. There the person whose vote was objected to was not, as here, omitted from the rate, but inserted, and wrongly inserted. *Bovill*, C.J., expressly points out that sect. 61 of "The Representation of the People Act, 1867," requires the part of a house conferring the franchise, under section 3 of that Act, to be *separately rated*, whereas, in that case, the occupier was rated jointly with others. He had not, therefore, brought his case within any earlier statute, and he was not within the 32 & 33 *Vict.* c. 41, s. 19, because his name was not omitted from the rate. It is true that the Judges go on to give reasons why section 19 does not apply, and say that, as regards the proviso, the occupier is not omitted from the rate; and, dealing with the facts of the case, they further say that the owner is not made

(*a*) 1 *Hopw. & Colt.* 444; *S. C. L. R.* 6 *C. P.* 315.

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liable either under section 3 or section 4. But the facts there did not raise, as they do here, the third case in which an owner may be liable, viz., by agreement with the occupier, nor was the question whether the word "liable" was to have the same meaning in section 19 as in section 8 in any way before the Court. I think, therefore, that, although in the judgments given in *Cross* v. *Alsop* (*a*) there may be some expressions which appear to limit the operation of section 19 to cases falling within section 3 and section 4, those expressions must not be taken in their full latitude, and the case itself does not conflict with our present decision.

But there is a case, viz., *Smith* v. *The Overseers of Seghill* (*b*) which is distinctly in point here. That was an application against the overseers of *Seghill* under section 19 for wilfully neglecting their duty in omitting the complainants' names from the rate-book. In that case the true construction of section 19 necessarily formed part of the *ratio decidendi*, and the Court of Queen's Bench, while adopting the same construction of section 19 that we do here, pointed out that they were not overruling *Cross* v. *Alsop* (*a*), and that the opinions there expressed as to the construction of the 19th section were not necessary to the decision.

Concurring as I do with the decision in *Smith* v. *The Overseers of Seghill* (*b*) and thinking that it is not in conflict with that of the Common Pleas in *Cross* v. *Alsop* (*a*), I am of opinion that the Revising Barrister has decided the present case rightly, and his decision must be affirmed.

(*a*) 1 *Hopw. & Colt.* 444; *S. C.* *L. R.* 6 *C. P.* 315.

(*b*) *L. R.* 10 *Q. B.* 422.

GROVE, J. I agree, and have nothing to add to what has fallen from my Lord in reference to the application of the 7th and 8th sections. I will merely say a few words as to how far the cases of *Cross* v. *Alsop* (*a*), and *Smith* v. *The Overseers of Seghill* (*b*) have a bearing on our present judgment.

In *Cross* v. *Alsop* (*a*) the claimant of the vote was not separately rated, and it being conceded that in order to entitle him to the franchise under sections 3 and 61 of "The Representation of the People Act, 1867," separate rating was essential, the question arose whether the 32 & 33 *Vict.* c. 41 had dispensed with its necessity. Accordingly, we find *Bovill*, C.J., in giving judgment, starting with the assumption that the claimant was not entitled under any previous Act, and applying himself to the only sections which under that Act could be relied on to entitle him. After showing that the case does not fall within the 3rd or 4th sections or the earlier part of section 19, he passes to the proviso, and points out that it is applicable only where the name of the occupier has been omitted from the rate, while in the case before him it had not been omitted. That judgment appears to me distinctly to have been given upon a different point from that now before us. There the claimant's name had been inserted in the rate, not omitted as in this case; but, though inserted in the rate, the claimant had not been separately rated. It is true that in some of the other judgments expressions are used which seem to indicate an inclination of some members of the Court to the opinion that the operation of section 19 is limited to cases falling either within

(*a*) 1 *Hopw.* and *Colt.* 444; *S. C. L. R.* 6 *C. P.* 315.
(*b*) *L. R.* 10 *Q. B.* 422.

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the 3rd or the 4th section, but those expressions of opinion were not necessary to the decision.

On the other hand the decision of the Queen's Bench in *Smith* v. *The Overseers of Seghill* (*a*) seems *in quatuor pedibus* with the present case. There the names of the occupiers having, as here, been omitted from the rate, it was sought to bring the overseers within the penal clause for a neglect of duty in omitting them. *Mellor*, J., in giving judgment said: "It was sufficient to have decided *Cross* v. *Alsop* (*b*), that the occupier of part of a house must be separately rated to the relief of the poor to entitle him to the franchise under the 3rd and 61st sections of 30 & 31 *Vict.* c. 102, and that a joint rating with other occupiers was not sufficient. Therefore without interfering with *Cross* v. *Alsop* (*b*), the construction put upon section 19 being not directly necessary for the decision of that case, we are at liberty to consider the construction of that section independently of that authority." And *Lush* and *Quain*, JJ., both of them in distinguishing *Cross* v. *Alsop* (*b*) relied upon the same grounds as we do here, viz., that the claimant was not omitted from the rate; and that, being inserted in it jointly with others, he was not separately rated. So far, therefore, from coming to a decision here which is in conflict with *Cross* v. *Alsop* (*b*) we are distinguishing it on the very grounds which were taken by two at least of the Judges of the Queen's Bench in *Smith* v. *The Overseers of Seghill* (*a*). It is true that in *Cross* v. *Alsop* (*b*) some strong expressions of opinion are to be found, but on looking at the facts of that case it appears to me that

(*a*) *L. R.* 10 *Q. B.* 422.
(*b*) 1 *Hopw. & Colt.* 444; *S. C. L. R.* 6 *C. P.* 315.

the Judges who decided it were addressing themselves to a different state of facts from that which we have to deal with, and that the distinction between the cases is a material distinction.

LINDLEY, J. I am of the same opinion, and but for the case of *Cross* v. *Alsop* (*a*) I should not have thought that the present case presented any difficulty; but having regard to *Cross* v. *Alsop* (*a*) it is impossible to say that a difficulty is not raised. The question for our decision turns on the true construction of section 19 of the 32 & 33 *Vict.* c. 41, as to which the views expressed by this Court in *Cross* v. *Alsop* (*a*), and the Court of Queen's Bench in *Smith* v. *The Overseers of Seghill* (*b*), have been different. It is true that on the particular facts of the case *Cross* v. *Alsop* (*a*) is distinguishable, but I am not sure that that altogether removes the difficulty which has been created by the judgments. Still, as the Court of Queen's Bench in *Smith* v. *The Overseers of Seghill* (*b*) had to put a construction on the 19th section, and have, notwithstanding the case of *Cross* v. *Alsop* (*a*) which was before them, arrived at what we all consider the more correct conclusion, I think we are justified in adopting their construction instead of adhering to that of *Cross* v. *Alsop* (*a*).

The question then for our decision is whether an occupier, whose rates have been paid by his landlord under an agreement between them, but whose name is not entered on the rate-book, is entitled to the franchise. This depends on sections 7, 8, and 19. Now, how does the landlord become liable to be rated instead

(*a*) 1 *Hopw. & Colt.* 444; *S. C.* *L. R.* 6 *C. P.* 315.

(*b*) *L. R.* 10 *Q. B.* 422.

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of the occupier? One way is by an agreement in writing with the overseers under section 3; another (which is specially mentioned in sections 7 and 8 and, so far as I can see, need not be in writing) is by an agreement with the occupier; and a third way is by a vestry order under section 4. If, therefore, the landlord may be liable *by agreement* to the payment of rates in two ways, viz., either by agreement with the overseers under section 3, or by agreement with the occupier, it appears to me too narrow a construction of section 19 to hold that it applies to the first only of these two ways, and that it must at all events apply where the landlord is liable by agreement with the occupier as well as where he is liable by agreement with the overseers.

It is said that this construction will have the effect of altering the law by a sidewind, and that rating will no longer be a test as regards the franchise. But that does not appear to me to be so. The rates must still be paid by some one; and the utmost consequence of our decision will be that an occupier whose rates have been paid under one or other of the two descriptions of agreements to which I have referred, will not be disfranchised because his name is not on the rate-book.

Decision affirmed.

Solicitors.—For Appellant, *Robinson, Preston, & Co.* for *Rowlands & Bagnall*, Birmingham.

For Respondent, *Sharpe, Parkers, & Co.* for *E. J. Hayes*, Birmingham.

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The sufficiency of the notice of claim under 6 *Vict.* c. 18, s. 4, is for the overseers, and where they have acted upon it by inserting the claimant's name in the list published by them under section 5, it is not competent for the Revising Barrister to require proof that the notice was served upon the overseers in due time. *Davies* v. *Hopkins* (*a*) *followed.*

AT a Court held before one of the Revising Barristers appointed to revise the list of voters for the county of *Gloucester*, *John Leonard* duly objected to the name of *Philip Alloways* being inserted in the list of voters for the parish of *Stapleton* in the Western division of the said county.

The following facts were established by the evidence.

That the claim of the respondent to be inserted in the said list of voters for the parish of *Stapleton* was not delivered or sent to the overseers of the said parish until after the 20th of July last, but was delivered to the said overseers on the 25th of July last.

That the said overseers published the said claim on the 29th of July last.

That the respondent attended at the said Court and duly proved his qualification.

Ten other persons delivered claims to be inserted in the said list under similar circumstances, and such claims were published by the said overseers on the said 29th of July, and they also attended at the said Court, and duly proved their qualifications.

The Revising Barrister decided that the names of the respondent and of the said ten other persons should be inserted in the said list.

Due notice of appeal was given, and the Revising Barrister ordered the appeals to be consolidated.

If the Court should be of opinion that the decision

(*a*) *K. & G.* 118; *S. C.* 3 *C. B. N. S.* 376.

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was wrong, the register was to be amended by erasing the names.

C. Bowen for the appellant. The respondent has admittedly not claimed in due time within 6 *Vict.* c. 18, s. 4; and the question for decision is whether notwithstanding his omission to do so, the overseers had the power to insert his name in the list of claimants. The language of sections 4 and 5 affords a strong argument to the contrary. Section 4 requires the claim to be sent in "*on or before the said 20th day of July.*" Section 5 requires the overseers to make out "an alphabetical list of all persons who, *on or before the 20th day of July* then next preceding, shall have *claimed as aforesaid.*" The respondent clearly cannot be said to have so claimed, since he did not claim till after the 20th of July. The overseers, however, although (their authority being purely statutory) they have no power beyond that derived from section 5, have, nevertheless, thought proper to insert the respondent in the list of claimants, and it will be contended on the other side that what they have so done is not open to be reviewed by the Revising Barrister. It must further be contended that the same consequence would follow if the overseers, while inserting the name, had themselves objected to it on the ground that the claim was too late; since it is impossible that any distinction can exist in this respect between the objection of an overseer and that of any other objector. The authority which will be relied on by the respondent in support of his contention is *Davies* v. *Hopkins* (*a*). There, no doubt, it was held that, even though a notice of claim be not personally

(*a*) *K. & G.* 118; *S. C.* 3 *C. B. N. S.* 376.

signed by the claimant, yet if it be signed in his name, and accepted by the overseers, and published by them in their list of claimants, the want of personal signature can form no ground of objection in the Court of the Revising Barrister; and *Williams*, J., in giving judgment went still further, and expressed a decided opinion that, even where no claim at all has been sent in to the overseers, yet, if they think fit notwithstanding to put the party's name on the list, the omission of the party himself to claim cannot afterwards form the ground of an objection. It is submitted that that view must at all events go too far. Its effect, if acted upon, would be to enable the overseers to make out the list of claimants from mere imagination, instead of making it out from the claims, as the Act directs. The overseers would thus have a discretion to dispense with the very essence of what the Act requires. The question no doubt turns on section 40, since that section regulates the course to be pursued at the revision, when a person has been placed by the overseers on the list of claimants, and has been objected to. The course in such a case is for the Revising Barrister, after the objector has proved his notices, then to "require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters" (which by section 6 includes the list of claimants as well as the old register). True, the words last cited are followed by the words "in respect of the qualification described in such list," but the latter words cannot narrow the operative effect of what precedes them. The Act distinctly and in terms requires proof of title to be inserted in the list of voters. That, as regards claimants, must by section 6

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mean "list of claimants." And the title to be inserted therein can only be ascertained by referring back to sections 4 and 5, from which sections we gather that one element of the title consists in due notice of the claim having been sent in to the overseers. That, according to the appellant's contention, is an indispensable condition, which cannot be waived by the act of the overseers. It has been already admitted that the opinion of *Williams*, J., in *Davies* v. *Hopkins* (*a*) is adverse to the appellant in respect of this contention. But the case itself may perhaps be distinguished by holding that, although the sending in of a claim is a condition precedent, the requirement as to the mode of making it out is merely directory.

[Lord COLERIDGE, C.J. If the requirement as to the mode of making out the claim be directory, why should not the same reasoning apply to the date when it is sent in ?]

Davies v. *Hopkins* (*a*), if it can be upheld, no doubt creates a difficulty. It is submitted, however, that the decision in that case was wrong, and *Webster* v. *The Overseers of Ashton-under-Lyne, Hadfield's Case* (*b*) is an authority that, if wrong, it may be impeached. The 6 *Vict.* c. 18, s. 6. does not in any way affect the question. That section does not render a decision "final and conclusive" except as an adjudication *in the case* in which the decision was pronounced. *Hadfield's case*, per *Brett*, J. (*c*). It is true that, although in *Webster* v. *The Overseers of Ashton-under-Lyne, Hadfield's case* (*b*)

(*a*) *K.* and *G.* 118; *S. C.* 3 *C. B. N. S.* 376.
(*b*) *Ante*, p. 89, *S. C. L. R.* 8, *C. P.* 306.
(*c*) *Ante*, p. 104; *S. C. L. R.* 8 *C. P.* 311.

the Court refused to be bound by a previous decision when wrong, they also intimated that they must be satisfied that it was clearly wrong before they will overrule it. But it is difficult to see what criterion is thus afforded for determining when a case may be impeached, since the question whether a decision is right or wrong can hardly be reducible to one of degree, and made to depend on the extent to which it can be shewn that it was erroneous. As regards the applicability of the doctrine laid down in *Hadfield's case* (*a*) to *Davies* v. *Hopkins* (*b*), it is not suggested that the decision in *Davies* v. *Hopkins* (*b*) was the result of any oversight, such as might arise from an omission to cite some earlier authority or some section of an Act of Parliament; but what is submitted is, that the Court, in deciding as they did, mistook the law, and did not give effect to well recognised legal principles. An overseer is an official who acts on behalf of the public, and in discharging his public duties he has no authority to waive a statutory condition which is not introduced for his own benefit, but in the interest of the public. Similarly, in penal actions and criminal cases, it is the policy of the law not to allow consent. In *Hunt* v. *Hunt* (*c*) Lord *Westbury* said, "*Quilibet potest renunciare juri pro se introducto.* I beg attention to the words '*pro se*,' because they have been introduced into the maxim to show that no man can renounce a right which his duty to the public, which the claims of society, forbid the renunciation of." If the overseer can waive the time within which a claim ought to be sent in, it would

(*a*) *Ante*, p. 89 ; *S. C. L. R.* 8, *C. P.* 306.
(*b*) *K.* and *G.* 118 ; *S. C.* 3 *C. B. N. S.* 376.
(*c*) 31 *L. J. N. S. Chanc.* 175.

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seem to follow that he can waive the claim altogether, and put whom he pleases on the list. The Act no doubt contains a variety of sections, each relating to the time within which some act has to be performed, and it may be that some of them must be regarded as directory.

[GROVE, J., referred to section 10.]

Even admitting some sections of the Act to be directory as to time, it does not follow that other sections do not make time a condition precedent.

Anstie, for the respondent, was not called upon.

Lord COLERIDGE, C.J. I am of opinion that the decision of the Revising Barrister was correct and must be affirmed. In regard to the question that has been raised as to what may be the exact power of this Court to reverse its own previous decisions, I decline to express any opinion. It is unnecessary on the present occasion that I should do so, because I agree with the decision in *Davies* v. *Hopkins* (*a*), which is an authority in point.

The objection which has been raised to the claimant's right to be registered is, that he did not claim within the time prescribed by section 4 of the Registration Act. The argument for the appellant, which upon this point was short and clear, was, that a claimant must be one who has claimed in accordance with the provisions of the Registration Act, and that the only list of claimants which the overseers are empowered to make out is a list of persons who have so claimed; consequently, that a person who has not so claimed has no right to be on the list of claimants. If the question

(*a*) *K. & G.* 118; *S. C.* 3 *C. B. N. S.* 376.

depended on the language of sections 4 and 5 alone, there would be much to be said in support of this contention; but the Act contains other provisions, which dealing respectively with the course to be taken by the Revising Barrister in two cases, first, where the claimant is not on the list, and secondly, where he is on the list and has been objected to, use manifestly different language in reference to the two cases, and materially affect the appellant's argument. Section 37 deals with the case of a person who is not on the list, but who claims to be there inserted. Under that section the claimant must satisfy the Revising Barrister that he is *rectus in Curiâ* and that the directions of the Act have in his case been complied with. In the words of that section he must prove "to the satisfaction of the Barrister" that he "gave *due notice* of such his claim to the said overseers." On the other hand section 40 deals with the case of those who are on the list—including those on the list of new claimants as well as those on the old register. That section, while omitting the words which I have quoted from section 37, merely requires it to be proved that the person objected to "was entitled on the last day of July then next preceding" "*in respect of the qualification described in such list*" "*to have his name inserted* in the list of voters." It is true that in citing the words of section 40 I have transposed them to make the meaning more apparent, but that cannot alter the construction of the section. The difference in language between ss. 37 and 40, to which I have called attention, appears to me strongly to show that the duty of making claims, and the power of the overseers in reference to them are correlative, and that the overseers are alone concerned with the directions given in

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section 5. Although I admit that at first sight a strong argument is raised by the words of sections 4 and 5, I think that on reading sections 37 and 40 it is conclusively answered, and I should have come to this conclusion quite independently of *Davies* v. *Hopkins* (*a*), though I also think that that case was well decided, and that it is an authority in point. Every argument indeed that can be advanced in support of the view that the day of the notice is material applies in my judgment equally to the form of the notice and *vice versâ*. Therefore, both on principle and authority I am of opinion that the judgment of the Revising Barrister was in this case right, and that it should be affirmed.

GROVE, J. I desire to base my judgment on *Davies* v. *Hopkins* (*a*), a case which appears to me, if any difference exists, to be even stronger than the present, and the principle of which Mr. *Bowen* admits to be applicable. I must own, however, that I have been much impressed by the force of the argument which has been addressed to us, founded on the language of sections 4 and 5, and that that impression still remains to this extent, that, although I do not say that if the matter were *res integra* I should come to a different conclusion from that arrived at in *Davies* v. *Hopkins* (*a*), I should certainly desire to hear the case argued on both sides. The force of Mr. *Bowen's* argument is no doubt lessened by the language of sections 37 and 40, and by the reference in section 40 to the 31st of July as the date of importance, while the 20th of July is not referred to at

(*a*) *K. & G.* 118; *S. C.* 3 *C. B. N. S.* 376.

all in that section, The 4th section is, moreover, one of a series of sections containing minute directions as to the time when certain things are to be done; and as to some of these, at all events, Mr. *Bowen* was compelled to concede that the requirement as to time could not be a condition precedent, but that it was merely directory. Upon the language of the Act I think that the matter is open to considerable argument, and that it is by no means free from doubt. But Mr. *Bowen*, in order to succeed in this case, has to satisfy us, not that the question he raises is open to some doubt, but that the decision in *Davies* v. *Hopkins* (*a*) was clearly erroneous. On the present occasion it appears to me to be neither necessary nor desirable to ascertain the exact limits of the rule, which was discussed in *Hadfield's case* (*b*), as to the power of this Court to overrule its previous decisions. Certainly that case did not go the length of establishing that, because this Court entertains some doubt as to the propriety of a former decision, it can therefore overrule it. Assuming such a power to exist, I think it can only be exercised in a case of manifest mistake, where the previous decision was clearly erroneous.

LINDLEY, J. I am of the same opinion. The claim should have been sent in on or before the 20th of July, but it was not sent in until the 25th. That was clearly irregular, and the claimant, not having claimed in due time, had no right to have his name on the list. But the further question remains, Was the irregularity one which the overseers had power to waive? *Davies* v.

(*a*) *K. & G.* 118; *S. C.* 3 *C. B. N. S.* 376.

(*b*) *Ante*, p. 89; *S. C. L. R.* 8 *C. P.* 306.

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Hopkins (*a*) decides that it was; and on a careful review of the sections of the Registration Act, I agree with that decision, and think that the overseers had the power of waiver which they have here exercised.

Decision affirmed.

Solicitors—For Appellant, *Ellis, Munday, & Co.*, for *Vizard & Co. Dursley.*

For Respondent, *Jerdein*, for *Carter, Newnham.*

(*a*) *K. & G.* 118; *S. C.* 3 *C. B. N. S.* 376.

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Objection was taken to the 3rd column, and to the nature of the interest of a county voter on the register for freehold land. The description in the 4th column was "Plots 166, &c., Victoria Estate," enumerating 15 of such plots. The voter had parted with all the plots but one, which, however, was freehold of sufficient value. The Revising Barrister, thinking he had no power to amend, expunged the voter's name. Held, reversing his decision, that the identity of the qualification remained unchanged; consequently, that he had power to amend. Held also, that the form of the notice was not such as to raise the objection, which applied merely to the local description.

AT a Court held before the Revising Barrister, appointed to revise the list of voters for the Northern Division of the county of *Northampton*, for revising the lists of the parishes in the polling district of *Wellingborough*, the respondent duly objected to the appellant being retained on the list of voters for the parish of *Wellingborough*.

The objection was grounded on the 3rd column of the register, and related to the nature of the interest of the appellant in the qualifying property.

The name of the appellant was on the list of voters for the parish of *Wellingborough*, as follows:—

Christian Name, &c.	Place of Abode.	Nature of Qualification.	Street, &c. where the Property is situate, &c.
Smith, Henry.	33, *Norfolk Street, Strand, London.*	Freehold Land.	Plots 166, 167, 168, 169, 171, 172, 173, 174, 176, 177, 178, 179, 175, 475, 476, *Victoria Estate.*

It was admitted that the appellant had parted with all the plots mentioned as above in the 4th column except plot 476, and that plot 476 which he retained was freehold land, and of sufficient qualifying value to confer the franchise.

Upon this state of facts it appeared to the Revising Barrister that the freehold land mentioned in the 3rd column was not the freehold land now possessed by the

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appellant, and that he (the Revising Barrister) had no power to amend the 4th column as requested by the appellant, by striking out the plots which he had parted with as aforesaid.

The Revising Barrister therefore held that the appellant was not entitled to be retained, as stated, upon the list of voters, and expunged his name therefrom.

If the decision of the Revising Barrister was correct, such list, as revised, was to remain without alteration; if incorrect, the name of the appellant, with his address and particulars of his qualification, was to be added.

Gibbons for the appellant. The decision of the Revising Barrister was wrong. The appellant retained a sufficient portion of his old qualification to entitle him to the franchise, and the description of anything beyond what he retained was surplusage; and, as such, should have been rejected and expunged. *Bendle* v. *Watson* (*a*) is an express authority that, where a change of circumstances has rendered the former description on the register erroneous, the qualification remaining the same, the Revising Barrister has power to amend what has thus become a misdescription, and that there is no necessity for the voter to re-claim. The qualification, it is submitted, remains the same in all cases, where the value of what remains is sufficient to confer the franchise.

Further, it is submitted that this point is not open to the appellant. The objection raised by the notice was only to the 3rd column, and to the nature of the interest;

(*a*) 1 *Hopw. & Colt.* 591; *S. C. L. R.* 7 *C. P.* 163.

and the interest, as appears from the case, was admitted before the Revising Barrister to be freehold land.

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The Court called upon

Horace Smith for the respondent. The point last-mentioned was not taken before the Revising Barrister, nor did he intend to raise it by his case. The answer to it, however, is that the Court must necessarily resort to the 4th column for the purpose of disposing of the objection which has been taken to the 3rd. *Hitchins* v. *Brown* (*a*), *Howitt* v. *Stephens* (*b*). The voter is bound, when objected to, to establish not merely that he has a freehold interest somewhere, but that he has it in a particular locality; and that locality can only be ascertained by resorting to the 4th column to ascertain it. In *Howitt* v. *Stephens* the objection was to the 3rd column, yet *Byles*, J., in giving judgment said (*c*): "I read the 3rd and 4th columns together." A person on the old register, who is objected to and has not sent in a new claim, is bound to shew not merely that he has a qualification somewhere, but that he retains the *same* qualification which has stood the test of a public investigation at some former revision. By section 4 of 6 *Vict.* c. 18 the overseers are required to give notice requiring all persons "who, being upon such register, shall not retain the *same* qualification . . . as described in such register" to send in a notice of claim. The appellant, having parted with fourteen plots of land out of fifteen, cannot be said to "retain the *same* quali-

(*a*) 1 *Lutw.* 328; *S. C.* 2 *C. B.* 25.
(*b*) *K. & G.* 188; *S. C.* 5 *C. B. N. S.* 30.
(*c*) 5 *C. B. N. S.* at p. 39.

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fication." And if not, he ought to have new claimed. The qualification is surely not the same, whenever the identity of the subject-matter has undergone a substantial alteration. It is obvious that the subject matter would not be the same here as formerly, if the question arose upon a contract of sale. The question no doubt is not precisely like that which would arise on a contract of sale. Thus it may be admitted that, if the qualification were a farm, that qualification would probably remain the same if a field were taken off, but not if the farm were substantially altered. Public policy seems to require a fresh claim whenever the alteration is substantial, so that the attention of the public may be called to the alteration. To hold the contrary would be a direct encouragement of fictitious entries in the 4th column, which might be successfully resorted to where the qualification was of doubtful value. The fictitious entries might readily mislead those whose business it was to object as to the value of the property, and so the claim might pass without objection; while, on the other hand, if the objection were taken that the claimant did not possess what he claimed, he would then fall back on his right to have an amendment. The principle contended for by the respondent is recognised by this Court in *Burton* v. *Gery* (*a*). There *Williams*, J., said (*b*): "The qualification on the list which has stood the test of public inquiry and investigation having ceased on the voter's ceasing to occupy the land, upon principle as well as upon the plain natural meaning of the words of the Act, the new occupation required a new claim."

(*a*) 2 *Lutw.* 4; *S. C.* 5 *C. B.* 7. (*b*) 5 *C. B.* 13.

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It is true that in that case the voter had given up one farm and taken another, so that, although the description on the register was sufficiently general to be applicable to either, it was clear that the qualification did not remain the same. Still the principle relied on by the Court, and stated as above by *Williams*, J., is equally applicable, wherever the alteration in the subject-matter is substantial. The description "*Victoria Estate*" alone would not have sufficed to identify what belonged to the appellant, and it was therefore essential that the plots which belonged to him should be specified. But a description of fifteen plots, when one only belonged to him, was misleading; and, if so, section 40 of 6 *Vict.* c. 18 forbids its amendment. Section 40 enacts that the Revising Barrister shall not "be at liberty to change the description of the qualification as it appears on the list, except for the purpose of more clearly and accurately defining the same." An amendment, if permitted here, would not have had the effect of describing the old qualification more accurately, but of altering the qualification in such substantial particulars as thereby to render it a new qualification.

Gibbons was not heard in reply.

Lord COLERIDGE, C.J. It is not quite clear in this case what was the objection really taken before the Revising Barrister, or at what the formal objection pointed. If, as I should infer, the objection was to the nature of the interest, as, for example, that it was not freehold but copyhold, then it certainly failed. The Court is clearly of opinion that a Revising Barrister whose attention is called by the notice to a particular

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objection, ought not to allow any other objection to be gone into, otherwise the voter might come prepared to meet one objection, and then be surprised by another for which he was not prepared. It is said that the real objection was not to the nature of the interest, but to the description in the 4th column. In the 4th column there was a description of fifteen plots of land of which fourteen had been sold. The plot that remained was, however, amply sufficient in point of value to confer the franchise. The Revising Barrister, being requested to amend by striking out the other plots, decided that he had no power to do so; though if he had considered that he had the power, I understand him to mean that he would have exercised it.

I am of opinion that the Revising Barrister had the power to amend. Mr. *Horace Smith*, in his able argument, did not suggest that there had been any improper dealing with the register; he merely suggested that there might be a possibility of such improper dealing. If indeed in a case, where the real qualification was of doubtful value, a voter had by means of fictitious entries got his name admitted upon the register without objection, and then, in a subsequent year, these facts were brought to the notice of the Revising Barrister by objection, I should hesitate to say that in such a case he ought to amend. But here everything was done with perfect *bona fides*. The appellant had possessed all the plots at one time, and though he had sold off portions from time to time, he still retained enough to qualify him. Mr. *Horace Smith* was driven to contend that if the appellant had had fifty fields and had sold off one, the Revising Barrister could not even then have amended; but, although that position was the

logical consequence of his argument, it is apparent, when such a consequence is admitted to follow, that the argument fails in substance and good sense. The difficulty in a case of this kind is no doubt to draw the line; and the only line which, in my judgment, can be drawn is that, where no fraud exists and the property which remains is sufficient to qualify the voter, the entry of anything beyond may be expunged as surplusage. That which remains is the qualification, and has always sufficed to confer the franchise.

I am of opinion that the amendment was within the Revising Barrister's powers and ought to have been made, and therefore that his decision must be reversed.

GROVE, J. I am of the same opinion. My attention has just been called to the 28 & 29 *Vict.* c. 36, s. 6 (*a*).

[His lordship read the section.]

The objection given in compliance with that section, "was grounded on the 3rd column of the register and related to the nature of the interest." But the nature of the interest being admitted to be freehold land, no objection could be maintained upon that ground.

(*a*) Section 6 enacts: "Any notice of objection to any person on the list of claimants for any parish or township may be given according to the provisions of the 7th section of the principal Act; but with that exception no notice of objection given under the provisions of the said 7th section, other than a notice to the overseers, shall be valid unless the ground or grounds of objection be specifically stated therein; and this provision shall be deemed to be sufficiently satisfied by naming the column or columns of the list on which the objector grounds his objection: Provided always, that if the objection be grounded on the 3rd column, then it shall be necessary to state in the notice whether the objection relates to the nature of the voter's interest in the qualifying property, or to the value of the qualifying property, or to both; and each of such last-mentioned grounds of objection shall be deemed a separate ground of objection, as well as any objection grounded on any one of the other columns."

Gibbons called the attention of the Court to the above section, after Lord Chief Justice *Coleridge* had concluded his judgment.

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Then, as regards the power of amendment, we have to consider whether the case comes within section 40 of 6 *Vict.* c. 18. In *Bendle* v. *Watson* (*a*) *Willes*, J., said: "As to the words 'change the description of the qualification': there, I think, qualification must mean the nature of the qualification, *e.g.*, freehold, while the object of a number is to individualise, and perhaps in that sense to describe. I think that throughout the word 'his' governs the meaning, and as the qualification is the same, and the description one which might in one sense be true, inasmuch as it might indicate this house to some people, *and there was no falsification or intention to deceive,* the Revising Barrister ought to have amended." Here I assume that there was no falsification or intention to deceive, and that enough of the same "freehold land" remained to qualify the voter. Had the Revising Barrister then the *power* to amend? We are not concerned with any question of his discretion. Suppose that the appellant had parted with one plot of land only, and that plot an insignificant one. In that case could not the Revising Barrister have amended? I think he could; and I am unable to see how his *power* can exist in the one case and not in the other. I think he had power to amend by striking out what was surplusage.

LINDLEY, J. I am of the same opinion. The 28 & 29 *Vict.* c. 36, s. 6, determines the first point in the appellant's favour.

Then, as to the power of amendment under 6 *Vict.* c. 18, s. 40. Looking to the terms of that section, I

(*a*) 1 *Hopw. & Colt.* 600.

think the Revising Barrister would have no power to amend where the amendment altered the identity of the qualifying property. Here the appellant described the nature of his qualifying property; he misdescribed or rather misrepresented the amount of his land in the 4th column but there was no change in the identity of the land which entitled him to his vote. I think, therefore, that the Revising Barrister had power to amend, and was not precluded by the provision "that he shall not be at liberty to change the description of the qualification as it appears in the list except for the purpose of more clearly and accurately defining the same." The error here was merely one of description. The description of the qualification as "*Victoria Estate*" was in accordance with fact, and the identity of the qualifying land remained the same. If so, then, notwithstanding the appellant's land has been altered in amount, I think that the Revising Barrister might and ought to have amended.

Decision reversed.

Solicitors—For the Appellant, *H. Smith.*

For the Respondent, *Lewis & Indermaur,*
for
Toller, Kettering.

BENNETT, Appellant; ATKINS, Respondent.

1878.
Nov. 28.

In the construction of "The Poor Rate Assessment and Collection Act, 1869," the agreement in writing required by section 3, and the notice in writing required by section 4, sub-section 2, are not directory requirements, but conditions precedent to the legality of the allowances which the overseers are empowered to make under those clauses, and as the overseers, in making such allowances, act in discharge of a public duty, they have no power to waive the performance of either of the conditions.

Therefore, where a vestry order had been made under section 4 for the rating of the owners of certain tenements instead of the occupiers, but, although no notice in writing had ever been given under sub-section 2 or agreement in writing entered into under section 3, the overseers in receiving payment of a rate from an owner had allowed him 25 per cent. (the allowance in so far as it exceeded 15 per cent. being sought to be justified under one or both of the above clauses): Held, that the allowance in excess of 15 per cent. was not one which the overseers were empowered to make, and consequently that the enactment in section 7, that payment by the owner is to be deemed "payment of the full rate by the occupier," "notwithstanding any allowance or deduction which the overseers are *empowered* to make," did not preserve the occupier's franchise (*a*).

AT a Court held on the 26th of September, 1878, before the Revising Barrister appointed to revise the lists of voters for the borough of *New Windsor*, *Henry Atkins* duly objected to the name of *Charles Bennett*, hereinafter called the appellant, being retained on the list of voters for the parish of *Clewer* in the said borough.

The description of the appellant on the said list was as follows: "*Bennett, Charles*, 91, *Victoria Cottages*, house, 91, *Victoria Cottages*."

The appellant occupied during the qualifying period a house No. 91, *Victoria Cottages*, and he stated that by agreement with the owner of the house the owner paid the poor rate thereon.

The rating of the said house No. 91, *Victoria Cottages*, was as follows:—

(*a*) See now 42 & 43 *Vict.* c. 10.

Parish of *Clewer*. Rate made the month of October, 1877.

No.	Arrears due or if Excused.	If Excused write the word Excused.	Name of Occupier.	Name of Owner.	Description of property rated.	Name or Situation of Property.
	£ s. d.					
263			*Bennett, Charles.*	*R. R. Gardner.*	Cottage.	91, *Victoria Cottages.*

Estimated extent.	Gross estimated Rental.	Rateable value.	Rate at 6*d.* in the pound.	Amount of Rate assessed upon and payable by the Owner instead of the Occupier by virtue of the Statute or Statutes in that behalf.	Allowed to Owner.	Total Amount to be Collected.	Amount actually Collected.
a. r. p.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.*	£ s. d.*
3	10 0 0	8 0 0	0 4 0	0 3 0	0 1 0	2 9 6	2 9 6

* (Bracketed with other names.)

The assistant overseer of the parish of *Clewer* produced the minute book of the vestry of the parish of *Clewer*, from which it appeared that at a vestry meeting of that parish held the 11th day of November, 1869, it was proposed by Mr. *Foster*, seconded by Mr. *George*, and ordered, that the owners of all rateable hereditaments in that parish to which the 4th section of the "Poor Rate Assessment and Collection Act, 1869," applied, be rated to the poor rate in respect of such rateable hereditaments instead of the occupiers, under which order of the vestry owners of property were entitled to an allowance of 15 per cent. from the full amount of rate payable by ordinary occupiers.

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The assistant overseer stated that neither he nor the overseers had received any notice in writing, as required by the 4th section, sub-section 2, of "The Poor Rate Assessment and Collection Act, 1869," from the owner of the cottage No. 91, *Victoria Cottages*, that he was willing to be rated and to pay the rates made in respect of the said cottage, whether the same was occupied or not; and, although such notice had not been given, the owner had been allowed a further abatement or deduction of 10 per cent., making together an allowance of 25 per cent. from the full amount of rate paid by ordinary occupiers.

It was objected to the appellant's right to be on the list of voters that the extra 10 per cent. was illegal, as no notice in writing had been given by the owner to the overseers that he was willing to be rated and pay the rates in respect of cottage "No. 91, *Victoria Cottages*," whether the same was occupied or not, and that he had not paid an equal amount of rate in the pound to that paid by an ordinary occupier, as required by the People's Representation Act, 1867, section 3, sub-section 4. On behalf of the appellant it was contended that the rate having been paid by the owner, he being rated instead of the occupier pursuant to the order in vestry, such payment by the owner must be considered as that of the occupier, by virtue of the 7th section of "The Poor Rate Assessment and Collection Act, 1869."

The Revising Barrister held that there was no proof or evidence that any written notice had ever been given by the owner to the overseers, as required by section 4, sub-section 2, of "The Poor Rate Assessment and Collection Act, 1869," to entitle him to the further abatement or deduction of 10 per cent., as had been allowed to the owner by the overseers, and, therefore, the owner

was not entitled to the extra deduction of 10 per cent., and the extra allowance of 10 per cent. allowed by the overseers to the owner was an illegal allowance, and that the appellant had not, therefore, on or before the 20th July last, *bonâ fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that had become payable by him in respect of the premises occupied by him up to the preceding 5th day of January, and the Revising Barrister expunged his name from the said list.

If the Court should be of opinion that the amount paid by the owner, after deducting the extra allowance of 10 per cent., was a legal allowance without any notice being given to the overseers, and was a sufficient payment of the rate by the appellant within the meaning of the 3rd section of the People's Representation Act, 1867, sub-section 4 (*a*), the name of the appellant was to be inserted in the said list.

(*a*) Section 3 of "The Representation of the People Act, 1867" (30 & 31 *Vict. c.* 102), enacts: "Every man shall in and after the year 1868 be entitled to be registered as a voter, and when registered to vote for a member or members to serve in Parliament for a borough who is qualified as follows (that is to say) . . . . 4. Has on or before the 20th day of July in the same year *bonâ fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him in respect of the said premises up to the preceding 5th day of January."

Section 3 of "The Poor Rate Assessment and Collection Act, 1869" (32 & 33 *Vict. c.* 41), enacts: "In case the rateable value of any hereditament does not exceed a certain sum" (the amount of which the section specifies for London, Liverpool, Manchester, and Birmingham,) "or £8 if situate elsewhere, and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow to him a commission not exceeding 25 per cent. on the amount thereof."

Section 4: "The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which section 3 of this Act extends situate within such parish shall be rated to the poor rate in respect of such rateable hereditaments, instead of

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The names of 229 other persons were expunged on the same ground, the appeals in all the cases being consolidated.

Sir *H. S. Giffard*, Solicitor-General (*Lewis Coward* with him). The Revising Barrister has decided against the vote upon the ground that no *proof* was given before him of any notice in writing under section 4, sub-section 2, of the 32 & 33 *Vict.* c. 41. Consistently with that finding, notice may have been given to the overseers of some former year, and either through the death of an overseer, or through some neglect, the notice may have been lost. Where the notice has once been given the overseers of subsequent years would be justified in continuing the allowance under a verbal arrangement, since a notice in writing in each year is not required. The maxim *omnia præsumuntur rite esse acta* may fairly be applied in support of the legality of the pro-

the occupiers, on all rates made after the date of such order; and thereupon, and so long as such order shall be in force, the following enactments shall have effect:

"1. The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of 15 per centum from the amount of the rate.

"2. If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding 15 per centum from the amount of the rate during the time he is so rated."

Section 7: . . . . "every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which, as regards rating, depends upon the payment of the poor rate.

Section 8: "Where an owner who has undertaken, whether by agreement with the occupier or with the overseers, to pay the poor rates or has otherwise become liable to pay the same, omits or neglects to pay any such rate, the occupier may pay the same and deduct the amount from the rent due or accruing due to the owner, and the receipt for such rate shall be a valid discharge of the rent to the extent of the rate so paid."

ceedings, regard being had to the length of time elapsed since 1869, when the vestry order was made for rating the owners of these tenements instead of the occupiers.

[Lord COLERIDGE, C.J. In a case of this importance it is impossible to suppose that, if a notice in writing had ever in fact been given, some evidence of it would not be forthcoming.]

That being the opinion of the Court, the case will be argued on the assumption that no notice in writing has ever at any time been given.

The question then for decision, viz., whether the franchise of the occupier fails because no notice in writing has ever been given by the owner to the overseers, arises under 32 & 33 *Vict.* c. 41, section 4, sub-section 2. The scheme of both the 3rd and 4th sections is similar. The object which those sections have in view is to enable the owners of tenements below a certain value to be rated instead of the occupiers, and in respect thereof to receive certain allowances. Section 4 shews that these allowances are to be given on two grounds; partly as a commission to the owner for the trouble which he saves the overseers from being put to in the collection of rates, and partly, where he assents to such a course, as a consideration to him for allowing his vacant tenements to be rated as well as those which are occupied. Under section 4 the allowance on the first ground is 15 per cent.; on the second ground, a further amount not exceeding 15 per cent. The 3rd section does not distinguish between the two kinds of allowances, but applies to them indifferently the term "commission," and limits the amount of "commission" to 25 per cent.

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Here, whether the correct amount of commission be 25 per cent. as contended by the appellant or 15 per cent. as contended by the respondent, that is purely a matter to be ascertained between the owner and the parish, and the rate, it is submitted, must in either view be regarded as paid. The hardship on the occupier will be serious, if he is to be deprived of his franchise because by some accident or mistake too large a commission has been allowed to the owner. The occupier is no party to the arrangement between the owner and the parish, nor can he inquire whether it is in writing, or as to its terms, or as to the owner's compliance with them. The case of *Reg* v. *The Mayor and Assessors of the Borough of Kidderminster* (*a*) is to a considerable extent an authority in the appellant's favour. There under the provisions of a local Act the owners of certain dwelling-houses were required to be rated instead of the occupiers, and the overseers were empowered to compound with the owners, at a certain rate depending on the annual rent or value of the dwelling-house, but nothing in the Act was to prejudice or affect any municipal or parochial franchises of the occupiers; and it was held that the title of an occupier to be put upon the burgess roll would not be affected by a mistake in the amount of the composition between the owner and the overseers.

[Lord COLERIDGE, C.J. Suppose here that the allowance had been 35 per cent.]

In that case the language of sections 3 and 4 would not be applicable. But, having regard to the authority

(*a*) 20 *L. J. Q. B.* 281.

cited, could it be contended that the occupier would be deprived of his franchise in a case of pure mistake as to the amount of the commission, as, for instance, if the owner and the overseers had made some arithmetical error in the computation of it? It is true that it may be said that the present case is not one of mistake in the same sense as in *Reg.* v. *The Mayor and Assessors of the Borough of Kidderminster* (*a*), and that in that respect the case is distinguishable. But even assuming that that distinction prevents the case from being a binding authority, it does not prevent the applicability of the reasoning on which the judgment was based. Here the appellant contends that the written notice is a mere preliminary form, the observance of which is not essential provided the substance of the section has been complied with, which he contends has been done. Suppose that the question had arisen between the owner and the parish as to whether the rate had been paid. It is consistent with the findings of the Revising Barrister (and if there be any ambiguity in the findings the case ought on that point to be sent back for amendment) that ever since 1869, when the vestry order was made, the owner has been paying the rates for vacant houses, so that the parish has had abundant consideration for the additional 10 per cent. allowance. It would be a hopeless contention before a jury that the parish had not under such circumstances received all that it was entitled to receive from the owner. The language of section 7 is also in the appellant's favour. By the terms of that section payment by the owner is to be deemed "payment of the full rate by the occupier," "notwithstanding any allowance or deduction which

(*a*) 20 *L. J. Q. B.* 281.

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the overseers are empowered to make." Then are the overseers empowered to make the deduction here? The sufficient answer surely is that they are empowered by an agreement which for ten years has been acted on, and of which the parish during the whole of that period has had the benefit. Is it also an indispensable requirement of section 4, sub-section 2, that, antecedently to any such agreement being entered into, there must have been a notice in writing from the owner, otherwise that the agreement, during whatever length of time it may have been acted on, is wholly inoperative? Surely the substantial requirement both in section 3 and section 4, sub-section 2, is the *factum* of an agreement; and, if so, that which is of the essence of the section is not required to be in writing. The utmost requirement of section 3 is a willingness of the owner to enter into an agreement in writing; and of section 4, sub-section 2, a notice of his willingness to be rated for unoccupied houses. But these being both preliminary requirements, it would be singular if in regard to mere preliminaries writing were held to be indispensable, when in regard to that which is the substantial requirement and the aim and object of both enactments, viz., the agreement to be concluded between the owner and the parish fixing the *quantum* of the allowance to be made to the owner, the Legislature has considered that writing is unnecessary.

The case of *Durant* v. *Withers* (*a*) may perhaps be cited by the other side as an authority in their favour. That case, however, has no bearing on the question whether the notice here omitted to be given is a condition precedent, or whether it is capable of being waived

(*a*) *Ante*, p. 202; *S. C. L. R.* 9 *C. P.* 257.

—in other words, it has no bearing, unless the points on which the appellant relies have first been decided against him.

Kingdon, Q.C., for the respondent. But for the refinements introduced into the argument on the other side, the case would, it is submitted, be of the simplest character. The 3rd section does not apply. It applies only where the owner has by agreement with the overseers *voluntarily* subjected himself to a liability for rates, and agreed to pay them for vacant tenements. That is not the present case. Here the owner is *compulsorily* rated, an order of the vestry made under section 4 being the authority for rating him. The respondent admits that in respect of that compulsory rating the owner is entitled under section 4, sub-section 1, to an allowance of 15 per cent., but he denies that the owner is entitled to any further allowance, because he has never taken the steps prescribed by the 2nd sub-section as the necessary step to entitle him to such allowance. To entitle himself to the further allowance the owner should have given notice in writing, as required by sub-section 2, so as to bind himself to pay for his vacant tenements. The appellant, on the other hand, admits that the owner has never given any such notice, but he claims, notwithstanding an allowance of 25 per cent., or, in other words, an allowance of 10 per cent. beyond what the statute entitles him to receive. It has been argued indeed for the appellant, that the requirement of a notice in writing in section 4, sub-section 2, is directory and not in the nature of a condition precedent. But the language employed in that sub-section is at all

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events, so far as words can make it, conditional; and there is a practical reason for its being so which goes far to shew that the conditional language was intentional. By the general law a vacant tenement is not rateable; and that circumstance would, of course, be a good defence if the owner were summoned for non-payment of the rates. But by giving the notice required under section 4, sub-section 2, the owner becomes liable to be rated for vacant tenements, and entitled to the allowance in respect of that rating. The Legislature evidently thought it of importance to provide that, before the allowance could be claimed, the parish authorities should have a written document in their possession from which the owner could not draw back, and which would bind him to pay for his vacant tenements. It has been argued indeed that, under section 4, sub-section 2, the written notice is a mere preliminary, and that the so-called subsequent agreement as to the amount of the allowance is the main object of the sub-section, and that that agreement is not required to be in writing. But in practice the amount of the allowance would in almost every case be arranged between the owner and the parish authorities before the notice was given by the owner. The existence of an agreement as to the allowance is moreover not an absolute requirement of the 2nd sub-section, though no doubt in practice an agreement on that point would in general be come to. But the wealth of the owner might be such as to render him wholly indifferent as to any allowance, while he might be most anxious with the view to the franchise of his tenants that all his property should be rated. By giving the prescribed notice he could clearly compel the parish so to rate him

without troubling himself to enter into any agreement as to the allowance, so that it is a fallacy to say that that agreement is the main object of the sub-section. A written notice was probably required by the Legislature as being more simple than a written agreement, and as requiring no stamp, and also because the Legislature desired to make it compulsory on the overseers to rate the owner for all his rateable property, whether vacant or not, if he called upon them to do so. *Durant* v. *Withers* (a) is an authority that a deduction made by the overseers without statutory authority is fatal to the franchise, because in such a case "an equal amount in the pound to that payable by other ordinary occupiers" within 30 & 31 *Vict.* c. 102, s. 3, has not been paid by the person claiming the franchise. It is true that in that case the deduction was one which could not under any circumstances have been validly made by the overseers; while here it might, if the notice required had been previously given. Still, inasmuch as the notice was not given, the allowance here was equally unauthorised as in *Durant* v. *Withers* (a). The argument founded by the other side on 32 & 33 *Vict.* c. 41, s. 7, really leads to an opposite conclusion. It is said that under that section payment by the owner is "payment of the full rate" by the occupier, "notwithstanding any allowance or deduction which the overseers are *empowered* to make." But if under section 4, sub-section 2, the overseers are *not* empowered to make the allowance from want of the written notice, then the converse proposition follows, viz., that the owner's payment cannot enure as payment of "the full rate."

(a) *Ante* p. 202; *S. C. L. R.* 9 *C. P.* 257.

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The Solicitor-General in reply. The reasoning of the other side might be applicable to show that where no notice in writing had been given, an executory agreement would not be enforced against the parish. But here there is an executed agreement of which the parish have had the benefit. The notice may surely under such circumstances be regarded as waived. Suppose that an agreement, intended to fix the amount of allowance under section 4, sub-section 2, had been actually drawn up and signed, an agreement of that description would not operate as a notice under the sub-section. Would it then, even after it had been acted on, become wholly inoperative for want of the notice? The object of the notice is to bring about an agreement such as the Act contemplates. If that be effected, the notice becomes immaterial. Sections 7 and 8 do not mention the word "notice" at all, but only the words "agree" and "agreement," which must mean, it is apprehended, an "agreement such as the Act contemplates."

[GROVE, J. Does not section 3 contemplate a written agreement? The words are "from the *date* of *such* agreement."]

That section does not in terms require a written agreement, but only the willingness of the owner so to agree. But the Act clearly contemplates two sets of agreements in reference to this subject, one under section 3, the other under section 4, sub-section 2. And both of these are equally within the contemplation of sections 7 and 8, the language of which in reference to agreements with overseers must, it is apprehended, clearly refer to both sets of agreements. Now in regard

to the latter set, viz., agreements arising under section 4, sub-section 2, there is nothing whatever in the statute from which it can be inferred that these need be in writing. It is true that overseers, having public duties to perform, have not the same powers of waiver as private individuals. But a mere preliminary may, it is submitted, be dispensed with. If the notice in question be held a condition precedent which cannot be waived, the result will be that these voters will all be disfranchised, notwithstanding the fact may be that the owner has paid more than enough to cover the full rate in the case of every one of his tenants by reason of his payments for unoccupied houses. The tenants ought at least to have notice of the rate being unpaid, if that be the fact; and, in the absence of such notice, it is submitted that the rate has not become "payable by them" within 30 & 31 *Vict.* c. 102, s. 3, s.-s. 4; for, unless it has become so payable, its payment is not one of the conditions of their enjoyment of the franchise. In *Flatcher* v. *Boodle* (*a*) a rate made on an outgoing tenant was held not to have become payable by the incoming tenant, because the latter had received no notice from the overseers of the rate having been left unpaid by the outgoing tenant. Under section 28 of 30 & 31 *Vict.* c. 102, a personal notice must now be served upon or left at the house of a voter, who is in arrear with his rates on the 20th June, unless the rate has been previously demanded by a demand note. And in *Rogers on Elections*, 12th edition, p. 103, it is said that "it would seem that, unless this notice is duly served, the voter would be entitled to be registered, although he had not paid." 32 & 33 *Vict.* c. 41, s. 10,

(*a*) *Hopw. & Ph.* 238; *S. C.* 18, *C. B. N. S.* 152.

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renders 30 & 31 *Vict.* c. 102, s. 28, applicable, notwithstanding the owners have become liable to be assessed, and thus preserves the right of the occupiers in that case also to receive the notice. Sections 7, 8, and 19 of 32 & 33 *Vict.* c. 41 may all be referred to, as shewing how careful the Legislature have been to preserve the franchise of the occupiers, while legislating with a view to the collection of the rates. It would be contrary to the spirit of the Act to disfranchise them here.

Lord COLERIDGE, C.J. Although the argument in this case has lasted a considerable time, the point for decision is, in my judgment, simple.

I shall assume the case to have found that no notice in writing has ever at any time been given by the owner to the overseers, for although the case does not find this in express terms, it is impossible to suppose that in a case of this importance both parties would not have come prepared with evidence as to so material a fact, and the Solicitor-General very frankly agreed to argue the case on the assumption that no notice in writing had ever in fact been given.

The question then is, whether a deduction of 25 per cent. which has been made from the rating of an owner can be justified. This depends on the true construction of the 32 & 33 *Vict.* c. 41. It is quite true that the person who will in this case be affected by the non-payment is not the owner but the occupier, and it may be said that a judgment disfranchising the appellant and many others will disfranchise them for causes which they had no means of preventing, because they were no parties to the arrangement between their

landlord and the parish, and consequently had no means of knowing whether the enactment under which that arrangement should have been made, had or had not been complied with. A short answer to that argument is that with the effect of the Act of Parliament we have nothing to do. We have simply to construe the Act, and if the consequences are found to be contrary to public policy, that must be remedied by the Legislature. But perhaps a better, though narrower, answer is that the 32 & 33 *Vict.* c. 41 gave to the voter privileges in respect of the rating portions of his franchise, which without that Act he would not have had, and that as he takes the benefit of the Act, he must also take the burden of it.

The question then is, are these proper deductions and properly made? I rather doubt whether in any view of the Act of Parliament too much has not been deducted; because, as far as I can gather from the case, the objection proceeded entirely on a discussion of the 2nd sub-section of section 4, and no question at all was raised upon the 3rd section; in other words, there was no evidence or suggestion of any agreement between the owner and the parish so as to justify any deduction beyond 15 per cent., while the deduction actually made was 25 per cent. That point, however, I do not wish to decide, because it may be possible from the terms of the case to arrive at some other conclusion in point of fact.

I am clearly of opinion that, whether the case be looked at as arising under the 2nd sub-section of section 4 alone, or under that section and section 3 together, my judgment must be adverse to the appellant.

The 3rd section enacts that in boroughs, of which

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Windsor is one, if the owner of a rateable hereditament not exceeding a certain value (which here the hereditaments in question do not) "is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow to him a commission not exceeding 25 per cent. on the amount thereof." That section deals with the case, where, irrespective of any action by the parish itself in vestry, an agreement is entered into between the owner and the overseers, and it provides that in that case the rates may be received from the owner and 25 per cent. may be allowed to him. The 4th section deals with another state of things. Its scope is limited to hereditaments within the 3rd section, which I take to mean hereditaments of the value and in the places to which the 3rd section applies. With regard to such hereditaments section 4 enacts that the vestry may order the owners of them to be rated instead of the occupiers. So far the provision applies only where the hereditaments are occupied, and when they are so it enacts that the owner shall be rated *in invitum*, and shall be allowed a deduction of 15 per cent. But the 2nd sub-section enacts that "if the owner . . . shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments," "whether the same be occupied or not," then the overseers shall rate him, and allow him a further deduction not exceed-

ing 15 per cent. That section therefore contemplates the making of an order by the vestry for the rating of owners *instead* of occupiers, which may be done without the consent of the owners; but if an owner gives notice in writing that he is willing to be rated for all such rateable hereditaments, whether occupied or not, then the overseers are bound to rate him, and he is entitled to receive a further allowance.

Now I will assume, for the purposes of my judgment, that there was an agreement here, not in writing, and, I will also assume, a notice not in writing, and I am of opinion that, both under the 3rd section and under the 4th, an agreement in writing under the 3rd section, and a notice in writing under sub-section 2 of the 4th section, are conditions precedent to the allowance being made. The 3rd section appears to me clearly to contemplate that an agreement in writing shall exist as the foundation of any arrangement under it. The construction of the 4th section is, in my judgment, this: Under the 43 *Eliz.* c. 2, and the subsequent statutes *in pari materiâ*, the overseers have power to rate; but they must rate all equally; if they do not, the rate is bad. By the 32 & 33 *Vict.* c. 41, s. 4 (for the moment I pass by the 3rd section), they are empowered, under certain conditions, to rate certain persons unequally, but, unless they pursue the conditions laid down by the statute, the rate is bad. Now, here the overseers have rated unequally, but they have not pursued the statute. The statute says, "if the owner" "shall give notice" "in writing," the overseers shall rate him and allow him a deduction. Here the owner has *not* given a notice in writing, and the overseers have rated him and allowed the deduction. To construe section 4, as we are invited

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to do by the Solicitor-General, we must insert the word "not" in the 2nd sub-section, or construe it as if the words were "whether the owner" "shall give notice to the overseers in writing or not," instead of "if the owner shall give notice to the overseers in writing." Now, I confess that, unless I am obliged, I dislike to be drawn into considerations of the spirit, or scope, or *intuitus* of an Act of Parliament, when these considerations would compel me to do outrageous violence to the language of the Act. The language itself is plain; it appears to me to give the overseers certain powers in a particular event; the event has not arisen, and therefore they have no such powers.

Then it has been suggested that the overseers may waive this notice in writing. But the Act of Parliament does not contain any provision enabling them to do so; and as the overseers are not private persons discharging a private duty, but public persons discharging a public duty, and as it is plain that, unless they have this notice in writing to refer to, they and the parish and the parishioners might and would be involved in constant disputes and discussions, I can see a very good reason, in point of common sense and practice, why they should not be permitted to waive it. Irrespectively of that consideration, I find nothing in the Act of Parliament which can give them any such power.

Further, I think that the view which I have expressed derives considerable additional support from the terms of the 7th section, because that section deals with the question of the payment of rates, which is to qualify for the franchise. In certain cases payment of rates by the owner is payment by the occupier, and is to be in all respects, for the purpose of the franchise, as if the occupier had

paid. The first part of the section deals with the payment of rates by the occupier. That, however, is not this case, because the occupier did not pay here, but the owner. What, then, is the enactment as to payment by the owner? "Every payment of a *rate* by the owner," which, I think, means a full rate, "whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and, notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which, as regards rating, depends upon the payment of the poor rate." If, therefore, the owner pays the full rate, or if by agreement with the occupier he pays less than the full rate, still, for the purpose of the franchise, it shall on certain conditions "be deemed a payment of the full rate by the occupier." What, then, are the conditions? He must pay it with such deductions as "the overseers are *empowered* to make from the rate." If the owner has not paid the full rate, and here he has not, or if he has paid it with deductions which the overseers "are *not* empowered to make," then it does not enure as a payment of the rate for the purpose of securing the franchise to the occupier. I think that "empowered" must mean empowered by law, not by some agreement which the law does not recognise. By the general law the overseers must rate all persons equally. The 32 & 33 *Vict.* c. 41 empowers them to rate certain persons unequally, but on certain conditions. If those conditions are fulfilled, the deduction is one which they are empowered to make. If they are not fulfilled, the deduction is one which they are not empowered to make. Here I think

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that, the required condition not having been fulfilled, the overseers were not empowered to make the deduction, and consequently the rate has not been paid.

The decision of the Revising Barrister was, in my judgment, correct, and must be affirmed.

GROVE, J. I am of the same opinion, though I must own that during a great part of the argument I entertained a contrary impression, because it was stated by the Solicitor-General, and apparently acquiesced in on the other side, that the words in the 3rd section, "the overseers may, subject nevertheless to the control of the vestry, agree with the owner," might be satisfied by a mere verbal agreement, and that an agreement in writing was not necessary. Now, supposing that view to be correct, then, inasmuch as section 7 uses the word "agreed," and section 8 the word "agreement," if those words refer either to the agreement expressly mentioned in the 3rd section or to the agreement which is contemplated by sub-section 2 of the 4th section, as to the amount of deduction to be allowed from the rate (though the word "agreement" does not occur in the 4th section), there would be great force in the argument that the franchise was, under the 7th section, made to depend, not upon a notice preliminary to the agreement, but upon the fact of the agreement itself; and that, although the preliminary notice might be necessary for some purpose, as, for instance, for a guarantee to the overseers that the owner would not retract, yet the want of the notice would not affect the franchise of the voter. But, on reading section 3 more carefully, it appears to me that that section does require an agreement in writing; and, if that be so, it gives, to

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my mind, a very different character to the intention of the Legislature as derived from the wording of the Act, both as regards section 3 and section 4. It tends to show that, before the overseers could allow the deduction here sought to be established, there must, under the one section be a definitive agreement in writing, and under the other a definite consent or notice in writing, from the owner. From the language of section 3 it appears to me clear that this is the true construction. That section provides that: "In case . . . . the owner of such hereditaments is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates." If that stood alone, it would come to very little, because the owner might verbally express his willingness to the overseers to enter into an agreement in writing; though undoubtedly a provision which merely required the expression of the owner's willingness to agree in writing, and was satisfied with that as the foundation of a subsequent verbal agreement, would be somewhat singular. But when I read the words which follow, I own it seems to me to be of the essence of this section that there should be an agreement in writing, and that the power which is given to the overseers is bound up with and dependent on the existence of such an agreement, and not on the mere willingness of the owner to enter into it. For the words of the section when read further are: "In case . . . . the owner of such hereditaments is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates" "for any term not being less than one year from the *date* of *such* agreement." Now there can be no date from which the term is to take effect without an agree-

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ment, and the words "such agreement" can only refer to the agreement previously mentioned, which is "an agreement in writing." I think, therefore, that the fair meaning of the section is that the overseers may, subject to the control of the vestry, agree with the owner in writing for any term not less than one year from the date of such agreement. But if that be so, it gives a different sense to the word "agreed" in the 7th section, and "agreement" in the 8th section; because these two words must be construed with reference to the provisions which have preceded them in the statute, and in so far as they refer to the 3rd section they must mean "an agreement in writing."

As to what the meaning is in the 4th section, I now proceed to express my opinion. Section 4, sub-section, 1 enacts: "The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of 15 per cent. from the amount of the rate." Sub-section 2 enacts: "If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding 15 per cent. from the amount of the rate during the time he is so rated." Therefore in that sub-section an agreement on both sides in writing is not required as in section 3; and apparently for this reason. In section 3 it is required, because it is optional with the overseers whether they will enter into an agreement or not with the owner; in section 4,

sub-section 2, it is not required, because it is not optional but imperative on the overseers to rate the owner; and therefore all that is required is that there should be some written document on behalf of the owner, which will be binding on him, or at least be evidence of his consent to the demand on the overseers for the performance by them of an imperative duty. Then what is matter of agreement, and need not be in writing is the amount of the further abatement, which must not exceed but may be less than 15 per cent. So construed the two sections have a sensible meaning, and it would be not merely straining plain language, but departing from the meaning of the statute to construe them differently.

The notice therefore becomes much more than a mere preliminary notice or directory matter, which might possibly be waived. It becomes a requisite without which the statute would not be complied with. I should be extremely loth to apply a different mode of reasoning to the 4th section to that which I apply to the 3rd unless I could see in the statute some satisfactory reason for its application. I think that the same object is aimed at in both sections: viz., that there should be a definite writing which should, in the one case express the agreement entered into between the parties, and, in the other case, should enable the overseers to have a voucher for the demand of the owner which obliges them to rate him instead of the occupier. I think it would be evading the statute to say that these two requirements are not of a solid and substantial character or that there is not a reasonable and intelligible motive for both of them. The argument in this case supplied an illustration. For suppose no written documents to be required by this statute, then, if through a

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course of years there had been negligence on the part of the overseers, questions of difficulty might arise depending entirely on oral evidence, and great inconvenience might be the result. I therefore think that the requirement of writing in each of these two sections is an absolute and necessary requirement, and one which the overseers, who are acting for the public, cannot waive: and as there has been no compliance here with either requirement the power to allow the deduction does not arise.

The decision of the Revising Barrister against the vote was therefore correct, and must be affirmed.

LINDLEY, J. I am of the same opinion. The appellant not having paid the rates himself, the question is, whether any one else has paid them for him in such a way as to render that substituted payment equivalent to a payment by him—in other words, whether the owner has paid the rate which is properly payable in respect of the tenant's occupation. Now, that turns on two points—first, the true construction of 32 & 33 *Vict.* c. 41, ss. 3 and 4; and secondly, the power of the overseers to waive what, for the moment, I will call the formality of a written notice. As to the construction of 32 & 33 *Vict.* c. 41, ss. 3 and 4, I do not think there can be any difference of opinion. The Act is an enabling Act, and it enables persons who have not paid their rates to enjoy the franchise upon certain terms and conditions. The 3rd section applies to cases of agreement between the owners and the overseers. I am indeed quite at a loss to understand why the words "willing to enter into an agreement" were used. The language is strange, and I have not heard any explana-

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tion of it. But having regard to the words which follow later in the section, and refer to "the date of such agreement." I cannot doubt that the construction indicated by my Lord, and with more particularity by my brother *Grove*, is correct; and that what is meant, though not said in terms, is, "where there is an agreement in writing between the owner and the overseers." Without so holding it is impossible to construe that section so as to give effect to the whole of it. Next, with regard to section 4, sub-section 2. The language there employed is tolerably free from ambiguity, and no one can doubt that what was there contemplated was, that a notice in writing should be given by the owner to the overseers, before the owner was rated or any allowance made to him under that sub-section. That however does not to my mind altogether exhaust and conclude the whole matter, because although an owner who did not give the notice could not claim the benefits of the statute, it does not follow that by some agreement between the owner and the overseers that formality might not be waived. For the reasons which I will presently give I do not think it could be waived in this particular instance. The 7th section throws some light on sections 3 and 4, and all of them tend to show that there is no power which enables the occupier of a house who has not paid his rates to acquire the franchise unless he proves that the owner has paid them for him.

The question is in my judgment reduced to the last point, viz., whether it is competent for the overseers to waive the notice in writing. At one time I thought that a good deal might be said in favour of that view, because it was argued very plausibly by the Solicitor-

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General, that the notice in writing is only a preliminary form, and that the substance of the thing is that the overseers are empowered to make an allowance not exceeding 15 per cent., in consideration of the owner assenting to be rated for empty houses (if any); and that inasmuch as here there had been such an agreement, and the overseers had had the benefit of it, the notice in writing was a mere matter of form which might be waived. But the answer to that argument is, that the overseers are not dealing with matters which affect themselves alone, but are the representatives of the parishioners, and indeed, as far as the present matter is concerned, of all persons who are entitled to the franchise; and it would expose the parishioners to the consequences of a great abuse of power if these formalities could be dispensed with. Unless the parishioners could hold the overseers to this, that unless they can produce an agreement or notice in writing these allowances must not be made, there would be nothing to prevent them from making improper allowances; and questions might thus be raised about the validity of rates which would involve parishes in endless lawsuits. Upon the broad ground therefore that the overseers were not acting for themselves, but for the public, and that it would be unsafe that they should have the power to waive a requirement of this description, I think that in the present case there was no waiver.

It is true that the case of *Leonard* v. *Alloways* (*a*), in which we recently held, in deference to previous authority, that overseers could waive the formality of receiving a notice of claim in proper time, apparently conflicts

(*a*) *Ante* p. 411; *S. C.* 48 *L. J. C. P. D.* 81.

with our present decision. But the ground of our decision in *Leonard* v. *Allonuys* (*a*), was that, unless we attributed such a power to the overseers, it became impossible to construe the different sections of the Act of Parliament. There we had to deal with conflicting sections, and on the true construction of the Act we held, as had been held some twenty years before in *Davies* v. *Hopkins* (*b*), that the formality was one which the overseers had power to waive. Here the language is very different, and I think it would be dangerous to say that the overseers can, at their option, waive a formality of this description, if indeed formality be the proper term to apply to it.

The Act of Parliament has not been complied with; and the appellant is, in my judgment, not entitled to succeed in his appeal.

Decision affirmed.

Solicitors—For Appellant, *C. T. Phillips.*

For Respondent, *T. Durant,*

for

B. C. Durant, Windsor.

(*a*) *Ante* p. 411 ; *S. C.* 48 *L. J. C. P. D.* 81.
(*b*) *K. & G.* 118 ; *S. C.* 3 *C. B. N. S.* 376.

GREEN, Appellant; MEPHAM, Respondent.

1878.
Nov. 23.

AT a Court held before the Revising Barrister appointed to revise the list of voters for the borough of *Bedford* the respondent duly objected to the name of the appellant being retained on the list of voters in respect of property occupied within the parish of *St. Mary* in the said borough.

The notice of objection required to be given to the party objected to was duly given to the appellant. The question was whether the notice of objection required to be given "to the overseers who shall have made out the list in which the name of the person objected to shall have been inserted" was duly given (6 *Vict.* c. 18, ss. 17 and 101).

Thomas Bathrey and *Thomas Minney* are the regularly appointed overseers of the poor for the parish of *St. Mary, Bedford,* for the year 1878.

St. Mary is one of the five parishes which constitute the borough of *Bedford,* and for the whole of these five parishes one collector of poor rates is appointed by the guardians under the provisions of 4 & 5 *Will.* 4, c. 76,

By 6 Vict. c. 18, s. 101, "the words 'overseers' or 'overseers of the poor' shall extend to and mean all persons who by virtue of any office or appointment shall execute the duties of overseers of the poor, by whatever name or title such persons may be called, and in whatsoever manner they may be appointed."

The borough of B. consists of five parishes, for which one collector of poor rates is appointed by guardians under 4 & 5 Will. 4, c. 76, s. 46. By the terms of his appointment his duties are "to assist the churchwardens and overseers" in the matters therein specified, relating to poor rates, "and to obey all lawful orders and directions of the guardians, and of the majority of the churchwardens and overseers," but by consent of the overseers he has been in the habit of discharging all their ordinary duties, including that of making out lists for revision purposes, and of attending the Registration Court.

Semble, per Lord *Coleridge*, C.J., that such collector was an "overseer" within sec. 101, on whom a notice of objection could be well served.

By the same section a notice is sufficiently served on any of the overseers if "left at his office or other place for transacting parochial business."

The collector discharged the overseers' duties at an office, forming part of his dwelling house, but having a distinct entrance. Held that a notice of objection, served there, was served at the proper place within the above section, there being no other place within the borough of B. where any parish business was transacted.

[illegible]

[illegible]

[illegible]

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Semble, per Lord *Coleridge,* C.J., that such collector was an "overseer" within 101, on whom a notice of objection could be well served.

By the same section a notice is sufficiently served on any of the overseers [illegible] at his office or other place for transacting parochial business."

The collector discharged the overseers' duties at an office, [illegible] dwelling house, but having a distinct entrance. Held that a notice [illegible] there, was served at the proper place within the above section [illegible] place within the borough of B. where any parish bus

s. 46, and the lists of voters for the said several parishes constitute the register of voters for the borough.

The collector's duties, by the terms of his appointment, are to assist the churchwardens and overseers in making, assessing, levying, and collecting the poor rates, in filling up receipts, keeping books, and making returns relating to poor rates, and to obey all lawful orders and directions of the guardians and of the majority of the churchwardens and overseers; but as a fact, and by the consent of the overseers, he has been in the habit of discharging all the ordinary overseers' duties, including that of making out lists for revision purposes, and of attending at the Registration Court, and there performing the overseers' duties.

The present collector, *Thompson*, transacts the whole of the business connected with the poor rates and the preparation of the list of voters, at an office, No 99, *Tavistock Street*, in the borough of *Bedford* (called for the purposes of this case the rate office), being a portion of his own residence, but having a separate entrance to it distinct from the dwelling-house. No allowance beyond his salary is made to the collector for the use of this office. A similar office in his own dwelling-house for such purposes was kept by *Thompson's* predecessor, *Joy*. It was proved that all persons going to the dwelling-house on parochial business are always sent to the office door; that at this office all the parish books are kept and produced to any voter requiring to see them; that all notices of claims and objections which have been delivered to any of the overseers are sent there to, or collected by *Thompson*, who produces them to any voter requiring to see them; and that he also attends to produce them to the Revising Barrister at his Court; that *Thompson* also makes out the list of

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voters and of claims and objections, which are kept at this office to be produced to any voter requiring to inspect them. The overseers do nothing whatever besides receiving notices of claims and objections if sent to them, and signing the lists which *Thompson* produces to them. There is no other office in the borough of *Bedford* where any parish business is transacted.

It was also proved by evidence that when *Joy* (the predecessor in office of *Thompson*, who held the same appointment *Thompson* now holds) was collector of the rates, notices of claims and objections were usually served at the office then occupied by him in a similar manner, and duly published by the overseers without any objection having been made, and that since *Thompson* has held the appointment notices of claims and objections have been left at the said rate office and duly published by the overseers, but that on one occasion when notices were handed to *Thompson* personally he informed the person delivering the same that in his opinion such delivery was irregular, but no objection was afterwards made before the Revising Barrister to the service of such notices; that both *Joy* and *Thompson* always received the whole of the allowance awarded by the Revising Barrister in respect of the overseers' duties connected with the registration, and that for many years past the whole of such allowances for the five parishes were included in one certificate, and were charged by the collector to the said parishes according to the rateable value thereof respectively.

On the 24th of August, 1878, the respondent left at the rate office a notice of his objection to the appellant's qualification, and this notice was received by *Thompson* on the same day. The overseers of *St. Mary*

objected to publish the name of the appellant in the list of persons objected to.

On behalf of the appellant it was objected that notice of the objection had not been duly given to the overseers.

For the respondent, the objector, it was contended that *Thompson* was, within the meaning of 6 *Vict.* c. 18, s. 101, a person who by virtue of his office or appointment executed the duties of the overseers of the poor, and that the said rate office was the office or other place for transacting parochial business within the meaning of the said section, and that the notice was duly served.

The Revising Barrister decided on the evidence that notice of the objection had been duly given to the overseers, and the appellant not having a good qualification he struck his name out of the list.

Against this decision the appellant appealed.

Graham, for the appellant. The decision of the Revising Barrister was wrong. The requirement of 6 *Vict.* c. 18, s. 17, as to service of the notice of objection on the "overseers" has not been complied with. Section 101 defines the words "overseers," or "overseers of the poor," to "extend to and mean all persons who, *by virtue of any office or appointment,* shall execute the duties of overseers of the poor, by whatever name or title such persons may be called and in whatsoever manner they may be appointed." A collector of poor rates, whose duties are limited by the terms of his appointment, and by the order of the Poor Law Board under which such appointment is made (*a*), does not become an "overseer" within the above definition

(*a*) As to this Order, see *Archbold's Poor Law,* 12*th ed.*, *p.* 84.

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merely because he has discharged the duties of an overseer, in point of fact, but without any appointment which authorized his discharging them. To satisfy the above definition he must have discharged the duties, either by virtue of an office, or of some appointment which would involve the discharge of an overseer's duties. It is true that in *Points* v. *Attwood* (*a*) an assistant overseer, appointed under 59 *Geo.* 3, c. 12, was held to be an "overseer" within 6 *Vict.* c. 18, s. 17. But the grounds of that decision were, that the terms in which the assistant overseer was appointed were general; and the Court in giving judgment expressly relied on that circumstance, and on there being no limitation of the duties which the assistant overseer had to perform; and, consequently, they held that he must be taken to have been appointed to perform all the duties of an overseer. The fair inference from that decision is, that, if the terms of the appointment had been limited, the Court would not have held the case to come within section 17. And similar reasoning applies with still greater force to a collection of poor rates.

[GROVE, J. Is not the case met by the words of section 101, "in whatsoever manner they may be appointed?"]

Those words do not, it is submitted, affect the proposition that the duties must be executed "by virtue of an appointment." The discharge of the duties with the consent of the overseers, or even with the consent of those who had the power to appoint would not be enough, if no appointment were in fact made. But

(*a*) 2 *Lutw.* 117; *S. C.* 6 *C. B.* 38.

here the case does not show such consent to have been given. The overseers themselves, indeed, appear to have consented to what was done; but the overseers themselves would have no power to appoint the collector to act as their deputy, nor would an order given by them to the collector for the discharge of these duties by him have been a lawful order. In *The Guardians of the Malling Union* v. *Graham* (*a*) the office of assistant overseer under 59 *Geo.* 3, c. 12, and of collector of poor rates under 7 & 8 *Vict.* c. 101, s. 62, were held to be inconsistent and incompatible.

[Lord COLERIDGE, C.J. In that case there were two regular appointments. The question was as to the liability of a surety on a bond which had been entered into for the due performance of duties which were specified in the first appointment; and the Court held that the default occurred in not accounting for monies which had been received under the second appointment.]

The case serves, at all events, to illustrate the distinction which exists between the office of collector and that of assistant overseer.

Secondly, assuming that one who has a merely limited appointment as collector of poor rates is not an "overseer" within the Act, the sufficiency of the service is not aided by the provision of 6 *Vict.* c. 18, s. 101, that, "wherever any notice is by this Act required to be given or sent to the overseers," "it shall be sufficient if such notice shall be delivered to any one of such overseers or shall be left at *his* office or other place for transacting parochial business," since the word *his* governs the sentence.

(*a*) *L. R.* 5 *C. P.* 201.

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[GROVE, J. The case does not find that this was not the overseers' office, and it does find, in express terms, that there was no other office in the borough of *Bedford* where any parish business was transacted.]

Shield, for the respondent, was not called upon.

Lord COLERIDGE, C.J. I am of opinion that in this case the decision of the Revising Barrister was correct, and that there was a good service of the notice of objection. In my judgment, indeed, there was a good service on the right person, but as my brother *Grove* entertains some doubt upon that point, I do not base my judgment upon it, but upon the ground that the notice was clearly served at the right place.

The 6 *Vict.* c. 18, s. 101, enacts that, "wherever any notice is by this Act required to be given or sent to the overseers," "it shall be sufficient if such notice shall be delivered to any one of such overseers, or shall be left at his place of abode, or at his office, or other place for transacting parochial business." Now, whether or not the place where this notice was served was the overseers' office, it falls, at all events, within the succeeding words, viz., "place for transacting parochial business." The case finds that all persons going to *Thompson's* dwelling-house on parochial business are always sent to the office door; that at this office all the parish books are kept, and produced to any voter; that all notices of claims and objections delivered to the overseers are sent there or collected by *Thompson*; that the list of voters and of claims and objections are kept there for inspection by any voter; and that there is no other office in

the borough of *Bedford* where any parish business is transacted.

It appears to me clear, I had almost said too clear for argument, that this is a "place" such as that section contemplates, and the proper place for serving the notice of objection.

GROVE, J. I am of the same opinion. The latter point might have been arguable if there had been any other independent place where parochial business was transacted; but as this was the place, and the only place, it would be tantamount to striking the words "other place for transacting parochial business" out of the Act to accede to the appellant's argument. I am also very much inclined to think that it was the overseers' office.

Upon the other point I confine myself to saying that, if it had become necessary for us to decide it here, I should have wished to have heard Mr. *Shield's* argument.

Decision affirmed.

Solicitors—For Appellant, *J. E. Fox & Co.*,

for

Conquest & Clare, Bedford.

For Respondent, *Sharpe & Ullithorne*,

for

L. Jessopp, Bedford.

AN

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CORRUPT PRACTICES.

See REPORT OF ELECTION JUDGE.

CUSTOMARY PRESENTMENT.

See QUALIFICATION (A), 2.

DECISION.

Not followed when wrong.

Semble. The Court, though a Court of ultimate appeal in registration cases, will review its previous decision when clearly wrong. *Webster* v. *Overseers of Ashton-under-Lyne* (*Hadfield's case*). 89
Barton v. *Town Clerk of Birmingham.* 393
Leonard v. *Alloways.* 411

DELIVERY.

Through post, near.

See OBJECTION, 2.

DESCRIPTION.

1. *Of qualification.*

The qualification of a person on the list of county voters was stated in the third column as "rentcharge on freehold house," and (upon the ground that this did not necessarily import a freehold rentcharge) the Revising Barrister held it to be an insufficient description, which he had no power to amend. Held, that the description as stated was sufficient;

but that, if there were any insufficiency for the purpose of identification, the Revising Barrister should have inquired further, and not have held it insufficient as matter of law. *Sherwin* v. *Whyman*. 185

See also OBJECTION, 1.

2. *In Rate Book.*

See RATING.

DIMINUTION OF QUALIFICATION.

See QUALIFICATION (A), 3.

DISCRETION OF TRUSTEES.

See DISQUALIFICATION.

QUALIFICATION (A), 4.

DISQUALIFICATION.

Alms which under s. 36 of the Reform Act disentitle the recipient to be registered for the borough franchise are not confined to those which come out of funds administered by the parochial authorities.

The surplus rents of certain lands, which by will were distributable among the poorest inhabitants of a tything at the discretion of trustees, averaged 40*l.*, which the trustees yearly distributed as they thought fit among about eighty inhabitants of the tything, in sums varying from 2*s.* 6*d.* to 12*s.* 6*d.*, according to the necessities of the recipient, and the number of his family. A proper recipient of this charity had within the qualifying year received 12*s.* 6*d.* from the trustees. Held that this was a receipt of "alms," which under section 36 disentitled him to be registered. *Harrison* v. *Carter*.

Cook's case. 324

Port's case. 327

See also POOR RATE.

DISTINCT RENTCHARGES.

See RENTCHARGE, 3.

DISTRESS.

See RENTCHARGE, 4.

DUPLICATE NOTICE OF OBJECTION.

See OBJECTION, 2.

DWELLING-HOUSE.

Section 61 of "The Representation of the People Act, 1867," enacts that "unless there is something in the context repugnant to such construction, the word 'dwelling-house' shall include any part of a house occupied as a separate dwelling and separately rated to the relief of the poor."

Held, per *Keating*, J., and *Denman*, J., that in reference to the dwelling-house franchise under section 3, these words are satisfied where "the part of the house in respect of which the franchise is claimed, has, during the whole of the qualifying twelve months, been occupied as a separate dwelling, and is, during that period, *separately rated* (or, more properly speaking, named in the rate as the subject-matter in respect of which its occupier is separately rated) to

all rates *made* during the qualifying year."

Per *Brett*, J., and *Honyman*, J., that the "part of a house" referred to in section 61, must have been the subject of *a separate rating during the whole* of the qualifying year.

The exception in the 7th section of "The Representation of the People Act, 1867," cannot be applied to any parliamentary borough in which, at the time of the passing of "The Representation of the People Act, 1867," there was no statute in force by which the owner could be rated instead of the occupier.

Stamper v. *Overseers of Sunderland*, *L. R.* 3 *C. P.* 388, discussed.

The claimant had during the qualifying year occupied part of a house in a borough consisting of two rooms, in which he and his family entirely lived. The rooms were not structurally separate from the rest of the house. They were connected by a staircase and passage used in common by the claimant and the occupiers of the rest of the house. The landlord did not live on the premises, or retain any control over them, the outer door being under the control of the claimant and other tenants only. Two rates were made during the qualifying year, *viz.* in *November*, 1872, and *May*, 1873, and in both the claimant was separately rated for the two rooms; but in the last preceding rate (*May*, 1872) the two rooms had not been separately rated. When "The Representation of the People Act, 1867," passed, there was no statute in force in the borough by which the owner of small tenements could be rated instead of the occupier. The Revising Barrister having held that, so far as the question was one of fact, the two rooms were occupied by the claimant as a separate dwelling, and separately rated.

Held, per *Keating*, J., and *Denman*, J., that the claimant was entitled to the dwelling-house franchise under section 3 of "The Representation of the People Act, 1867."

Per *Brett*, J., and *Honyman*, J., that he was not, for the rooms were not separately rated during the *whole* of the qualifying year; and per *Brett*, J., they were not occupied as a separate dwelling within section 61. *Boon* v. *Howard*. 208

EQUITABLE FREEHOLD.

See QUALIFICATION (A), 1.

EVIDENCE.

See OBJECTION, 2.

EXCHANGE OF HOUSES.

See RESIDENCE, 2.

FINALITY OF DECISION.

See DECISION.

FORMS.

See OBJECTION, 1.

PRACTICE.

FRANK TENEMENT.

See RENTCHARGE, 3.

FREEHOLD INTEREST.

See QUALIFICATION (A).

FREEMAN.

See RESIDENCE, 3.

GROUND OF OBJECTION.

See OBJECTION, 1.

HOSPITAL.

See QUALIFICATION (A), 1.

IDENTITY OF QUALIFICATION.

See QUALIFICATION (A), 3.

ILLEGAL COMPOSITION FOR POOR RATES.

See POOR RATE, 1, 2.

INACCURACY.

In rate book.

See RATING.

INCAPACITY.

To vote, or be registered.

1. Peers of Parliament have no right to vote at elections of members of the House of Commons, and are therefore not entitled to be placed on the register of voters. *Beauchamp, Earl,* v. *Overseers of Madresfield.* 41

Salisbury, Marquis of, v. *Bontems.*
Same v. *Bidwer.*
Same v. *Overseers of South Mimms.* 51

2. Irish peers who have not been elected members of the House of Commons are not entitled to have their names upon the register of voters. *Rendlesham, Baron,* v. *Haward.* 175

3. One who is under age on the 31st of July is not entitled to be registered at the succeeding Revision, though then of full age, in respect of the county occupation franchise, conferred by sec. 6 of "The Representation of the People Act, 1867." *Hargreaves* v. *Hopper.* 304

INDORSEMENT.

On special case.

See PRACTICE, 2.

INFANCY.

See INCAPACITY, 3.

INHABITANT OCCUPIER.

See RESIDENCE, 1, 2.

INSUFFICIENCY.

Of description in rate book.

See RATING.

IRISH PEERS.

See INCAPACITY, 2.

LEASE FOR LIVES.

By Lord of Manor.

See QUALIFICATION (A), 2.

LIST OF CLAIMANTS.

See OVERSEERS, 2.

LIST OF VOTERS.

See OVERSEERS, 1.

AMENDMENT.

LORD OF MANOR.

Lease for lives by Lord.

See QUALIFICATION (A), 2.

MILITIA SERGEANT.

See OCCUPATION, 1.

MISTAKE IN LIST.

See AMENDMENT.

NOTICE.

By owner to overseers under 32 & 33 *Vict. c.* 41, *s.* 4, *sub-sec.* 2.

See POOR RATE, 2.

NOTICE OF APPEAL.

See PRACTICE, 1.

NOTICE OF CLAIM.

See OVERSEERS, 2.

NOTICE OF OBJECTION.

See OBJECTION.

OBJECTION.

Form of objection.

1. Objection was taken to the 3rd column, and to the nature of the interest of a county voter on the register for freehold land. The description in the 4th column was "Plots 166, &c., Victoria Estate," enumerating 15 of such plots. The voter had parted with all the plots but one, which, however, was freehold of sufficient value. The Revising Barrister, thinking he had no power to amend, expunged the voter's name.

Held, reversing his decision, that the identity of the qualification remained unchanged; consequently, that he had power to amend.

Held also that the form of the notice was not such as to raise the objection, which applied merely to the local description. *Smith* v. *Woolston.* 421

Service on voter, delivering near by post.

2. W. (the place of abode of a county voter, as described on the list of voters) was two miles distant from E., the nearest post town. To prove service on the voter of a notice of objection the stamped duplicate addressed to him at W. was produced, and it was proved

that the notice was sent so as to arrive in the ordinary course of post at E. at 10 a.m. on the 19th of August. There was no delivery at W., and the voter would not receive the notice unless by some accidental conveyance.

Held, no evidence under 6 *Vict.* c. 18, s. 100, that the voter had received the notice of objection in due time.

Lewis v. *Evans*. 279

Service on Overseers, by service at place for transacting parochial business.

3. By 6 *Vict.* c. 18, s. 101, a notice is sufficiently served on any of the overseers "if left at his office or other place for transacting parochial business."

A collector of poor rates appointed by guardians under 4 & 5 *Will.* 4, c. 76, s. 46, discharged all the ordinary duties of the overseers at an office, forming part of his house, but having a distinct entrance. *Held*, that a notice of objection, served there, was served at the proper place within the above section, there being no other place within the borough of B. where any parish business was transacted.

Green v. *Mepham*. 458

OCCUPATION.

As Tenant.

1. Sec. 2 of 31 & 32 *Vict.* c. 76, enacts (with an exception not here material) that "every member of the permanent staff of the regular militia when disembodied *shall reside* in such places as shall be sanctioned by the Secretary of State for War," and this section, though repealed as an enactment, has the same effect as if its provisions were embodied in a royal warrant. The respondent, a sergeant on the permanent staff of the W. Militia, occupied, as such, a house (forming part of the buildings so sanctioned) close to the premises where the arms, accoutrements, and clothing of the corps were stored, and so built for the accommodation of the men employed in looking after the stores. The house was assigned to the respondent by his commanding officer, but he was liable to be turned out of it at any moment, and if he left the house without his commanding officer's permission it would be a breach of discipline, for which he would probably be dismissed from the service. Formerly 4*d.* per day had been allowed as lodging money, and a deduction of 2*s.* 4*d.* per week was now made from the respondent's pay as occupier of the house; but he would not receive it if, for his own convenience, he resided elsewhere. The case found that the respondent could perform his duties equally well if he were living elsewhere, which he might

do by his commanding officer's permission.

Held (reversing the decision of the Revising Barrister) that the respondent did not occupy as tenant within sec. 3 of 30 & 31 *Vict.* c. 102.

Fox v. *Dally.* 261

Of part of a house, as separate dwelling.

See DWELLING-HOUSE.

In borough, of parsonage house not depriving of county vote for pew rents.

2. A. was minister of a church, and entitled to the balance of the rents of the pews after certain deductions for church services made by the churchwardens, who had the duty of letting the seats. The amount was at least £100 a year. He also occupied the parsonage house, in respect of which he had acquired the right to vote for the borough. He claimed to vote for "freehold land and pew rents." No profit accrued from the land. The case did not show how the pew rents could confer a freehold qualification, but merely reserved the question whether the house was a part of the benefice, which could not be divided so that any remaining part could give the right to vote for the county.

Held, that, as the case assumed that A.'s interest in the pew rents was such as to confer the county vote, and as it was not an interest or estate in a building "occupied by himself," together with the parsonage house within the meaning of 2 *Will.* 4, c. 45, s. 24, the vote must be allowed.

Beswick v. *Alker.* 36

See also RESIDENCE.

OFFICE.

See OBJECTION, 3.

OVERSEERS, 3.

OFFICER ON LEAVE.

See RESIDENCE, 3.

OVERSEERS.

Alteration by them of register, its effect on notice of objection.

1. Overseers have no authority to alter the copy of the register transmitted to them by the clerk of the peace, but must publish it in its integrity.

Therefore, where upon a change in the abode of a county voter the list transmitted by the clerk of the peace was altered accordingly by the overseers, and published by them in its altered state: *Held*, that a notice of objection sent by post, addressed to the voter's place of abode as described in such published list, was not addressed to his "place of abode as described in the *List of Voters*," within 6 *Vict.* c. 18, s. 100, and consequently that there had been no sufficient service of the notice under that section. *Nosworthy* v. *Overseers of Buckland-in-the-Moor.* 127

Waiver of due notice of claim.

2. The sufficiency of the notice of claim under 6 *Vict.* c. 18, s. 4, is for the overseers, and where they have acted upon it by inserting the claimant's name in the list published by them under section 5, it is not competent for the Revising Barrister to require proof that the notice was served upon the overseers in due time. *Davies* v. *Hopkins* (*a*) *followed.*
Leonard v. *Alloways.* 411

Waiver of notice under 32 & 33 *Vict. c.* 41, *s.* 4, *sub-s.* 2.

See POOR RATE, 2.

Collector of poor rates acting as overseer.

3. By 6 *Vict.* c. 18, s. 101, "the words 'overseers' or 'overseers of the poor' shall extend to and mean all persons who by virtue of any office or appointment shall execute the duties of overseers of the poor, by whatever name or title such persons may be called, and in whatsoever manner they may be appointed."

The borough of B. consists of five parishes, for which one collector of poor rates is appointed by guardians under 4 & 5 *Will.* 4, c. 76, s. 46. By the terms of his appointment his duties are "to assist the churchwardens and overseers" in the matters therein specified relating to poor rates, "and to obey all lawful orders and directions of the guardians, and of the majority of the churchwardens and overseers," but by consent of the overseers he has been in the habit of discharging all their ordinary duties, including that of making out lists for revision purposes, and of attending the Registration Court.

Semble per Lord *Coleridge*, C.J. that such collector was an "overseer" within sec. 101, on whom a notice of objection could be well served.
Green v. *Mepham.* 458

PARSON

See RESIDENCE, 1, 2.

PARSONAGE HOUSE.

See OCCUPATION, 2.

PAYMENT OF POOR RATE.

See POOR RATE, 1, 2.

PEERS OF PARLIAMENT.

See INCAPACITY, 1, 2.

PEW RENTS.

See OCCUPATION, 2.

PLACE

for transacting parochial business.

See OBJECTION, 3.

PLURALITIES ACT.

See RESIDENCE, 1.

(*a*) *K. & G.* 118; *S. C.* 3 *C. B. N. S.* 376.

POOREST INHABITANTS.

See DISQUALIFICATION.

POOR RATE.

Payment of unequal amount.

1. A. claimed the borough franchise for a house, in respect of which, before the qualifying year, he had agreed with his landlord that the poor rates should be paid by the landlord and included in the rent; and the landlord had agreed with the overseers to pay a composition on the poor rates. In the rate immediately preceding the qualifying year the amount of the composition was carried out under the heading "Amount of rate assessed upon the owner instead of the occupier by virtue of the statute or statutes in that behalf," but no statute existed, which authorised such an assessment. The amount assessed was paid by the landlord. Subsequently, the absence of statutory authority for the assessment having been discovered, the landlord, in September of the qualifying year, of his own accord paid to the overseers the difference between the full amount of rate and the composition previously paid:

Held, that A. could not be deemed, in respect of this rate, to have paid an equal amount in the pound to that payable by other ordinary occupiers within section 3, sub-section 4, of "The Representation of the People Act, 1867." *Durant* v. *Withers* 202

2. In the construction of "The Poor Rate Assessment and Collection Act, 1869," the agreement in writing required by section 3, and the notice in writing required by section 4, sub-section 2, are not directory requirements, but conditions precedent to the legality of the allowances which the overseers are empowered to make under those clauses, and as the overseers, in making such allowances, act in discharge of a public duty, they have no power to waive the performance of either of the conditions.

Therefore, where a vestry order had been made under section 4, for the rating of the owners of certain tenements instead of the occupiers, but, although, no notice in writing had ever been given under sub-section 2, or agreement in writing entered into under section 3, the overseers in receiving payment of a rate from an owner had allowed him 25 per cent (the allowance in so far as it exceeded 15 per cent. being sought to be justified under one or both of the above clauses):

Held, that the allowance in excess of 15 per cent. was not one which the overseers were empowered to make, and consequently that the enactment in section 7, that payment by the owner is to be deemed "payment

of the full rate by the occupier," "notwithstanding any allowance or deduction which the overseers are *empowered* to make," did not preserve the occupier's franchise (*a*).
Bennett v. *Atkins*. 430

Omission of occupier from rate book.

3. The operation of section 19 of "The Poor Rate Assessment and Collection Act, 1869," (32 & 33 *Vict.* c. 41) is not restricted to cases where the overseers have agreed in writing with an owner to receive the rates from him under section 3, or where the vestry has ordered the rating of owners instead of occupiers under section 4, but applies wherever an agreement within section 7 has been entered into between an owner and an occupier for payment of the rates by the owner.

Therefore where A., the occupier of a counting-house of a value above the limit to which sections 3 and 4 of the said Act are applicable, and sufficient to qualify under the Reform Act (2 *Will.* 4, c. 45), had agreed with the owner of the whole house of which the counting-house formed part that the owner should pay the rates, and the owner had accordingly been rated and had paid the rates for the whole house: *Held* that, although the overseers had omitted A. from the rate-book, and he had not claimed to be rated, his franchise was preserved by section 19.

Smith v. *Overseers of Seghill* (*b*) followed, *Cross* v. *Alsop* (*c*) distinguished.
Barton v. *Town Clerk of Birmingham*. 393

See also RATEABLE VALUE.
RATING.

POOR RATE ASSESSMENT AND COLLECTION ACT, 1869.

See POOR RATE, 2, 3.

POOR RATE COLLECTOR.

See OVERSEERS, 3.
OBJECTION, 3.

POWER OF DISTRESS

See RENT CHARGE, 4.

POWER OF SALE.

See QUALIFICATION (A), 4.

PRACTICE.

On appeal, notice to respondent.

1. A consolidated appeal was signed on the 31st October, and, no one else assenting to be named respondent, the returning officer was named by the Revising Barrister. Notice of appeal was not given to the respondent till the 4th November (the first day appointed for hearing appeals being the 13th), and it was sought to excuse the delay. The respondent not appearing,

(*a*) See now 42 & 43 *Vict.* c. 10.
(*b*) *L. R.* 10 *Q. B.* 422.
(*c*) 1 *Hopw. & Colt.* 444; *S. C. L. R.* 6 *C. P.* 315.

Held, that there had been *reasonable time* to give ten days' notice before the 13th, and consequently that the appeal could not be entertained. *Brown* v. *Tamplin.* 17

Indorsement on Case, in Consolidated Appeal.

2. Where, upon the consolidation of several appeals, the Revising Barrister names one of the persons interested, and consenting, on behalf of himself and the others to prosecute the appeal, the person so named is the only one who need appear by the endorsement of the case as the appellant. *Sherwin* v. *Whyman.* 185

See also OBJECTION.

PRESENTMENT.

By Commoners.

See QUALIFICATION (A), 2.

PROMISE TO TREAT.

See REPORT OF ELECTION JUDGE.

QUALIFICATION.

(A) IN COUNTIES.

Hospital.

1. The corporation of a hospital consisted of the master and three ancient brethren, in whom lands were vested by the charter of incorporation. The bishop was empowered to make statutes, among other purposes, for the addition of younger brethren, who however were to form no part of the corporation. The number of younger brethren under the existing statutes were twenty-three, their appointments being made by the master. They were liable to dismissal for misconduct, but no instance of dismissal was known. The estates were under the management of the master, who, after paying the land, and income tax, tithes, repairs and other outgoings, was to retain one-third of the net revenue for himself, pay £25 to each of the ancient brethren, and £70 to the chaplain; and, after reserving a balance not exceeding £60 for current expenses to divide the residue among the younger brethren, so that no younger brother should receive more than £25. The share of a younger brother had always, in fact, exceeded £24. No hospital building was in existence, nor did any younger brother occupy any land of the hospital.

Held, that the younger brethren had neither equitable estates, nor "tenements" in the nature of rentcharges. *Simey* v. *Marshall.* 1

Lease for Lives, by Lord of Manor.

2. The claimant of a freehold county vote claimed in respect of land, formerly part of the waste of the manor of N. under a lease granted to him by the lord in 1861 for three lives, with a covenant to

add a life on each of the first two deaths. Similar leases had been granted since 1838, but there was no evidence of such leases previously. From time immemorial the burgesses of N. had exercised rights of common of pasture over the waste, but for 100 years and upwards it had been the practice at their Courts Leet and Courts Baron for the mayor and burgesses to present to the lord individual burgesses for occupation of pieces of the waste, most commonly with the addition, after naming such burgess, "he to agree with the lord for the rent." In all cases the persons so presented took possession of the land, generally building cottages and other buildings thereon, and paid the rents to the lord which he had fixed, such rents being very small sums varying according to circumstances. No duration of holding was specified in such presentments, but upon the death of the person presented, his personal representatives continued to occupy and pay rent to the lord without further reference to the Court Leet. The claimant was presented to the three plots of land comprised in his lease in 1841, 1852, and 1855 respectively, and had retained possession and paid rent to the lord until the present time, in accordance with his lease.

Held (no question of value being raised) that the claimant had a good freehold qualification vested in him by the lord, and that as regards the commoners the claimant could not at all events be disturbed by them during his own lifetime. *Phillips* v. *Salmon.* 339

Identity of Qualification, though Diminished in Extent.

3. Objection was taken to the third column, and to the nature of the interest of a county voter on the register for freehold land. The description in the fourth column was "Plots 166, &c., Victoria Estate," enumerating fifteen of such plots. The voter had parted with all the plots but one, which, however, was freehold of sufficient value. The Revising Barrister, thinking he had no power to amend, expunged the voter's name.

Held, reversing his decision, that the identity of the qualification remained unchanged; consequently, that he had power to amend by striking out what was surplusage. *Smith* v. *Woolston.* 421

Estate in Fee, subject to Power of Sale.

4. By deed between the owners in fee of a rentcharge of £120 per annum (described in the deed as trustees) and thirty-four persons (described therein as beneficiaries), after reciting an agreement for the sale by the trustees to each beneficiary of one-fifty fourth share of

the said rent at the price of £52 5*s.*, it was declared that the trustees stood seised of one equal undivided fifty-fourth share of the said rent, and the remedies for enforcing payment thereof, &c., in trust for each beneficiary, "his *heirs* and assigns absolutely," and of the remaining shares in trust for themselves in fee. There was a covenant by each beneficiary that if he should desire to sell his share in the said rent and premises, it should first be offered to the trustees at a price to be ascertained, in case of dispute, by arbitration, and a similar covenant by each trustee as to his own beneficial share; and then a declaration that the trustees for the time being should have "an absolute power of sale over the said rent and premises exercisable at their or his discretion, without any further consent on the part of any person."

Held, that under this power the trustees could not sell the share of a beneficiary without being accountable to him for the proceeds of the sale; consequently that each beneficiary took a freehold interest in his share, which would entitle him to the county franchise.

Semble, that the deed was one within the scope of 23 & 24 *Vict.* c. 145, ss. 1 and 4. *Ashworth* v. *Hopper*. 283

See also RENTCHARGE.

(B) IN BOROUGHS.

See DISQUALIFICATION. OCCUPATION.

RATE BOOK.

See RATEABLE VALUE. RATING. POOR-RATE.

RATEABLE VALUE.

The rate-book is not conclusive of the "rateable value" under 30 & 31 *Vict.* c. 102, s. 6, sub-s. 2. *Cooke* v. *Butler*. 22

RATING.

The £12 county occupation franchise was claimed by G. A. (son of N. A.) for partnership premises occupied jointly with T. B. A., a brother and co-partner. The "name of occupier" on the rate-book was "N. A. & Sons." Formerly N. A. had been rated solely for the premises, occupying and carrying on the business by himself; but, on taking G. A. and T. B. A. into partnership, he had requested the overseers to alter the rating to "N. A. & Sons," which was done. Afterwards N. A. retired, and for some years either G. A. or T. B. A. had paid the rates when called for, taking a receipt in the name of "N. A. & Sons."

Held, that G. A. was rated within 30 & 31 *Vict.* c. 102, s. 6, sub-s. 3, any insufficiency or inaccuracy in the description being

cured by 6 *Vict.* c. 18, s. 75. *Little* v. *Overseers of Penrith.* 26

See also POOR-RATE.

RECEIPT OF ALMS.

See DISQUALIFICATION.

REMEDY IN CHANCERY.

See RENTCHARGE, 4.

RENTCHARGE.

Actual Possession.

1. Grant of a rentcharge to A., B. and C., and their heirs, to hold to the said A., B. and C., their heirs and assigns, to the use of the said A., B. and C., their heirs and assigns for ever, as tenants in common and in equal shares.

Held, that this was no statute use, but that the grantees were in, at the common law, as tenants in common, and not as joint tenants; consequently that until rent had been paid there was no "actual possession" within section 26 of the 2 *Will.* 4, c. 45. *Webster* v. *Overseers of Ashton-under-Lyne* (*Orme's case*) 60

2. *Cestui que use* of a rentcharge under a deed which created it is, by force of the Statute of Uses (27 *Hen.* 8, c. 10), in "actual possession thereof," within the meaning of 2 *Will.* 4, c. 45, s. 26, immediately on the execution of the deed, although no portion of the rent be received.

Aliter where the grant operates wholly at common law. (*Heelis* v. *Blain* (*a*) followed.) *Webster* v. *Overseers of Ashton-under-Lyne.* (*Hadfield's case*). 89

Qualification by Distinct Rentcharges.

3. The owner of freehold rentcharges, each below, but together exceeding 40*s.* in annual value, is entitled to the county franchise as owner of "free tenement" of the required value within 8 *Hen.* 6, c. 7, although the rentcharges issue out of distinct estates. *Wood* v. *Hopper.* 311

Suspension of Power of Distress.

4. The grantee of a freehold rentcharge sufficient in value to confer the county franchise, is not deprived of such franchise by the circumstance that the land is at the time of the grant under lease for a long term (so as to suspend the grantee's power of distress), the ground rent reserved by the lease being sufficient to pay the rentcharge. *Dawson* v. *Robins.* 317

See also QUALIFICATION (A), 4

REPORT OF ELECTION JUDGE.

To work a disqualification under section 43 of the Parliamentary Elections Act, 1868, the report made to the House of Commons by the election judge must state expressly, or at all events so as to leave no room for doubt, that bribery has been committed by or with the

(*a*) *Hopw. & Ph.* 189; *S. C.* 18 *C. B. N. S.* 90.

knowledge and consent of the candidate. If the report be on its face ambiguous, the observations made by the election judge in delivering his judgment in the election petition cannot be resorted to for the purpose of clearing up the ambiguity. *Grant* v. *Overseers of Payham.* 358

RESIDENCE.

Rector Abroad.

1. The borough vote was claimed for a glebe-house by the rector. He had been abroad from *October* to *June* of the qualifying year, having gone abroad under a licence from the bishop. During his absence a curate, under a licence from the bishop which required him to reside, resided at the glebe-house; three of the rooms were reserved and locked up, and the key of them left with a servant who had been employed by the rector, but who was paid by the curate. The curate could not have been required to leave the glebe-house, if his rector had returned there, without being provided with accommodation elsewhere. During the other periods of the qualifying year the rector had been in residence.

Held, that his residence was insufficient to qualify for the borough franchise. *Durant* v. *Carter.* 142

Exchange of Livings.

2. The respondent, a parson, occupied as tenant and resided continuously in the house in respect of which he claimed the borough franchise, except that for two months, one of which (July) was in the qualifying year, he exchanged his house and duties with a brother clergyman (who resided more than seven miles from the borough). They also exchanged the use of their servants. The respondent reserved two rooms in his house, a bed-room and dressing room, but only to prevent their being disturbed. He did not return nor contemplate returning during the two months. The annual value of the house was above 10*l.*

Held, a break in the residence fatal to the franchise. *Ford* v. *Pye.* 157

Officer in Army.

3. The respondent, an officer in the army, was a freeman of Exeter, and was in the habit of living there, when on leave, in certain rooms appropriated for him by his mother in her house. His usual length of leave was three months in each year, and in the qualifying year he was on leave and at his mother's house during January, February, and March. Except when on leave he was with his regiment stationed more than seven miles from Exeter.

Held, that the respondent had not for six calendar months next previous to the 31st of July, in the

qualifying year, resided in Exeter, or within seven miles thereof, so as to entitle him to the franchise. *Ford* v. *Hart*. 167

Guest in Almshouse.

4. The residence required by section 31 of the Reform Act (2 *Will.* 4, c. 45) need not be that of an owner or tenant.

Therefore, where during two months of the qualifying period for residence the voter stayed with his wife and child as the guest of his mother-in-law in an almshouse, where they had a separate sleeping-room.

Held, notwithstanding the rules of the charity forbad anyone to reside with an inmate without permission from the trustees, and there had been no permission, that the voter nevertheless had a sufficient residence, and that the continuity of his residence was not broken by his absence for a night in London on business. *Beal* v. *Ford*. 374

RESULTING TRUST.

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SEPARATE RATING.

Period to qualify part of a house as "dwelling-house."

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SERGEANT OF MILITIA.

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